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CASES ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

AND IN THE

EXCHEQUER CHAMBER,

FROM

HILARY VACATION, 1857, TO TRINITY TERM, 1858.

BY

JOHN SCOTT, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. IV.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS, WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

HENRY WHARTON, ESQ.

EDITOR.

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OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD OF THESE REPORTS.

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Lord Chief Justice.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir RICHARD BUDDEN CROWDER, Knt.
The Hon. Sir JAMES SHAW WILLES, Knt.
The Hon. Sir JOHN BARNARD BYLES, Knt.

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Sir RICHARD BETHELL, Knt.

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A

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CASES

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Vacation,

XXI. VICTORIA. 1858.

The Judges who usually sat in Banc at these Sittings, were:

WILLIAMS, J. — WILLES, J.
CROWDER, J. — BYLES, J.

TABOR and Others *v.* EDWARDS. *Feb.* 10.

To a scire facias suggesting a further breach of a bond, the defendant pleaded,—secondly, that, after the commencement of the action, and before the issuing of the scire facias, he was a trader, &c., and indebted, &c., and suspended payment; and that thereupon "a certain memorandum of arrangement within the meaning and according to the provisions of the said statute" (12 & 13 Vict. c. 106) was made between him and the several persons whose names were thereunto subscribed, being creditors, &c.; that "*all things were performed and done as required by the said statute to make the said memorandum of arrangement an obligatory instrument within the terms of the said statute* upon all the creditors of the defendant;" that the plaintiffs were creditors, and, after the said suspension of payment, and after the said memorandum of arrangement had been so signed, and before the issuing of the scire facias, had notice; and that the defendant and the parties of the other part had at all times since the making of the memorandum of arrangement well and truly observed the agreements, &c., therein; and that, by reason of the premises, and by force of the statute, the said memorandum of arrangement became and was and is obligatory on the plaintiffs as if they had signed the same.

The third plea set up a judge's order, made by consent, whereby the proceedings were ordered to be stayed on payment of costs, and averred that the costs were duly paid.

Held, that the second plea was bad, inasmuch as it disclosed nothing to show that the memorandum of agreement was a bar to the action.

Semble, that such a deed must, to satisfy the 224th section of the 12 & 13 Vict. c. 106, contain an absolute assignment of *all* the debtor's property for distribution amongst his creditors; and *semble*, that the plea should have alleged that such a notice was given as is required by s. 225.

Held, also, that the third plea was bad.

THIS was a scire facias quare executionem non.

The writ recited that whereas William Tabor, David Lloyd, and James
*2] Lyne Hancock, on the 14th of *November, 1856, in our Court of Common Pleas at Westminster, by the judgment of the same court recovered against you the said Henry Edwards 507*l.* 19*s.* 2*d.*, whereof you the said H. Edwards are convicted; which said judgment was obtained upon a bond dated the 21st of January, 1856, and sealed with the seal of you the said H. Edwards, whereby you the said H. Edwards became held and firmly bound to the said W. Tabor, D. Lloyd, and J. L. Hancock, in the penal sum of 500*l.*, to be paid to the said W. Tabor, D. Lloyd, and J. L. Hancock, with and under a condition to the said bond subscribed, of which condition a breach had been committed by you the said H. Edwards before the commencement of the said action in which the said judgment was obtained as aforesaid; which said condition was and is in the words and figures and of the tenor and effect as follows, that is to say,—"Whereas the above-bounden John Amey hath agreed to effect a policy of assurance with the said society, upon the life of himself, in the sum of 900*l.*, at the annual premium of 32*l.* 14*s.* 9*d.*; and whereas, upon the request of the above-bounden obligors, the obligees in the above-written bond lately agreed to lend to the said John Amey, out of moneys in their hands in trust for the Gresham Life Assurance Society, the sum of 300*l.*, upon the terms that the repayment thereof, with interest for the same at the rate of 5*l.* for every 100*l.* for a year, should be secured to the said obligees, their executors,
*3] *administrators, and assigns, by the joint and several bond of the said John Amey and of the above-mentioned Charles Barber and Henry Edwards as his sureties, and by a deposit of the said recited policy, and by the provisions hereinafter contained; and whereas the said obligees have, immediately before the execution of the above-written bond, paid the said sum to the said John Amey, as he doth hereby admit, and the said policy hath been deposited accordingly: Now, the condition of the above-written bond is such, that, if the said obligors, or some or one of them, do and shall pay or cause to be paid unto the said obligees, or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor, the full sum of 300*l.* of lawful money of Great Britain, with interest, by the instalments and in manner following, that is to say, the said principal sum by six consecutive instalments of 50*l.* each, to be respectively paid at the chief office for the time being of the said society on the 21st of July and the 21st of January in every year until the whole of the said principal sum shall be fully repaid,—the first of such payments to be made on the 21st of July now next ensuing,—and do and shall on the said several days of payment pay or cause to be paid to the said obligees, or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor, at the office aforesaid, interest after the rate of 5*l.* for every 100*l.* by the year for the said principal sum, or for so much thereof as from time to time shall remain unpaid,—such interest to commence from the day of the date of the above-written bond; and if in the mean time the premiums on the said policy shall be duly paid, and the said policy shall in all respects be duly maintained and kept in force and available, and no one of them the said

obligors shall in the mean time die or go to reside out of *England, [*4
or make or attempt to make any arrangement to depart from the
united kingdom, or *become bankrupt*, or be declared insolvent, or be
imprisoned for debt or outlawed, *or compound or attempt to compound
with his creditors*, or *take or attempt to take the benefit of any act or
acts now or hereafter to be in force for the protection, relief, or discharge
of insolvent debtors*, or *of any act or acts now or hereafter to be in force
for facilitating arrangements between debtor and creditor*, or *accept or
take the benefit of any* letter of license or *deed of arrangement with all
or any of his creditors*, or obtain or attempt to obtain any extension of
time for payment in whole or in part of any debt or debts due, owing,
or payable, or to become due or owing or payable from him, or make
or execute any bill of sale or warrant of attorney as a security for or in
satisfaction of any such debt or debts, or suffer judgment by default or
otherwise in any action or proceeding for the recovery of any such
debt or debts, or give or consent to any order of a judge for payment
of such debt or debts,—then and in such case, and after such payments
as aforesaid, the above-written bond shall be void, or else shall remain
in full force: Provided always, that, if default shall be made in pay-
ment of the said instalments and interest, or any of them, or any part
or parts thereof respectively, for the space of twenty-one days after
the day or days hereinbefore appointed for the payment thereof, or
if, whilst any money shall remain on the security of the above-
written bond, the premiums necessary for keeping on foot the said
policy shall not be duly paid by the said obligors, or some or one of
them, or if the said policy shall for any other cause become void or
voidable, or if, before the 21st of January, 1859, any one or more
of the said obligors shall die or go to reside out of England, or make or
attempt to make any arrangement to depart from the united kingdom,
*or become bankrupt, or be declared insolvent, or be imprisoned for [*5
debt, or outlawed, or compound or attempt to compound with his
or their creditors, or take or attempt to take the benefit of any act or
acts now or to be hereafter in force for the protection, relief, or discharge
of insolvent debtors, or of any act or acts now or to be hereafter in force
for facilitating arrangements between debtor and creditor, or accept or
take the benefit of any letter of license or deed of arrangement with all
or any of his or their creditors, or obtain or attempt to obtain any
extension of time for payment in whole or in part of any debt or debts
due, owing, or payable, or to become due or owing or payable from him
or them, or make or execute any bill of sale or warrant of attorney as a
security for or in satisfaction of any such debt or debts, or suffer judg-
ment by default or otherwise in any action or proceeding for the recovery
of any such debt or debts, or give or consent to any order of a judge for
payment of any such debt or debts,—then and in any such case, and at
any time or times thereafter, the above-written bond shall be a security
for, and may be put in force for obtaining and enforcing, immediate
payment by the said obligors, or any or either of them, their, any or
either of their, or his, heirs, executors, or administrators, unto the said
obligees, or the survivors or survivor of them, or their or his assigns, or
the executors or administrators of such survivor, of the said principal
sum of 300*l.*, with interest for the same after the rate and to be com-

puted as aforesaid, or so much of the same principal sum and interest as shall not have been paid, and also for obtaining and enforcing the payment by the said obligors, or any or either of them, or any or either of their or his heirs, executors, or administrators, unto the said obligees, or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor, of all and every the pre-
*6] miums and premium, sums and sum of money for which the *said obligees or any of them shall have obtained an acknowlegment of credit or receipt in writing from the said Gresham Life Assurance Society for the purpose of keeping on foot or renewing the said policy against the said company, notwithstanding that default shall have been made by the said obligors, and every of them in making the payments necessary for keeping the said policy on foot, or that any breach of the conditions or stipulations contained in or endorsed on the said policy shall have occurred, together with interest for such premiums or premium, sums or sum of money for which such credit or receipt shall have been given as aforesaid,—such interest to be computed on the respective premiums or sums, after the rate aforesaid, from the time or times from which such credit or receipt shall have been given for the same; and further for obtaining and enforcing from the said obligors, or any or either of them, their or any or either of their, or his, heirs, executors, or administrators, the payment to the said obligees, or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor, of all costs, charges, and expenses to be paid or incurred by them or any of them in or about the enforcing or attempting to enforce the above-written bond against the said obligors, their heirs, executors, administrators, or assigns, or any one or more of them, or otherwise incident to or consequent upon any breach or default of the foregoing conditions, or any of them: Provided always that nothing herein contained shall extend or be deemed to extend as imposing any obligation upon the said obligees, or the survivors or survivor of them, or their or his executors, administrators, or assigns, or upon the said Gresham Life Assurance Society, to renew or cause or procure to be renewed the policy in cases of non-payment of any such premium or
*7] premiums as aforesaid, or in case of breach or *non-observance of any of the provisoes, conditions, or stipulations contained in or endorsed upon the said policy: Provided further, that, if default shall be made in payment of any of the instalments of the said principal sum, or in payment of the interest thereon, or of any premium or premiums upon the said policy, contrary to the conditions aforesaid, and the said obligees, or the survivors or survivor of them, or their or his executors, administrators, or assigns, shall have waived any such default, and shall have accepted payment of any of the said instalments and interest, or have permitted the renewal of the said policy (if the said Gresham Life Assurance Society shall choose to renew the same) without enforcing full payment of the said principal sum, and the interest thereof, or so much thereof as shall then remain unpaid, such waiver and acceptance or renewal shall in nowise prejudice or defeat the right of the said obligees, or the survivors or survivor of them, or their executors, administrators, or assigns, to proceed upon the above-written bond, on the happening of any subsequent breach or breaches of the foregoing con-

dition, or any part thereof, and so from time to time: Provided further, that the giving time to the said John Amey, or the having any other dealings with him by the said obligees, or the survivors or survivor of them, or their or his executors, administrators, or assigns, or any of them, shall not affect, release, or discharge the said sureties, or either of them, or their or either of their heirs, executors, or administrators, from liability under the above-written bond, but that such liability shall continue until all moneys intended to be secured by the above-written bond shall be fully paid:" And whereas we are now also informed on behalf of the said W. Tabor, D. Lloyd, and J. L. Hancock, in our said court, that, after the commencement of the said action wherein the said judgment was recovered as aforesaid, you the said *H. Edwards compounded [*8 with your creditors within the meaning of and contrary to the said condition, and that, at the time when you so compounded with your creditors as aforesaid, a large part of the said principal sum of 300*l.* and interest in the said condition mentioned, to wit, in all, the sum of 260*l.*, was and remained unpaid, and thereby and by virtue of the said condition, upon such compounding as aforesaid, became and was payable to the said W. Tabor, D. Lloyd, and J. L. Hancock, and that the said sum of 260*l.* still is and remains in arrear and unpaid to the said W. Tabor, D. Lloyd, and J. L. Hancock,—for which said breach, being another and further breach, since the said judgment, of the said condition, the said W. Tabor, D. Lloyd, and J. L. Hancock have humbly besought us to provide them a proper remedy: And we, being willing that what is just in this behalf should be done, do, according to the statute in that behalf made and provided, command you, that, within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our Court of Common Pleas at Westminster to show cause why execution should not be had and awarded against you upon the said judgment so obtained as aforesaid, for the damages to be assessed by reason of the said last-mentioned breach of which we are now informed as aforesaid, if it shall seem expedient for the said W. Tabor, D. Lloyd, and J. L. Hancock, and further to do and receive what our said Court shall then and there consider of you in this behalf: And take notice, that, in default of your so doing, the said W. Tabor, D. Lloyd, and J. L. Hancock may proceed to execution. Witness, &c. And the said H. Edwards has appeared to the said writ; and the said W. Tabor, D. Lloyd, and J. L. Hancock prayed that execution might be adjudged to them against the said H. Edwards upon the said judgment so obtained for the damages to be assessed by *reason of the said last-men- [*9 tioned breach of the said condition of the said bond, according to the form and effect of the said recovery, &c.

The defendant pleaded,—first, that he did not, after the commencement of the said action, compound with his creditors, within the meaning of or contrary to the said condition, as alleged.

Secondly, that, after the commencement of the said action, and before the issuing of the scire facias herein, he, the defendant, was a trader liable to become bankrupt under the bankrupt laws, and within the meaning of The Bankrupt Law Consolidation Act, 1849, and, before and at the time of the making of the memorandum of arrangement hereinafter mentioned, was indebted to the parties of the other part of the

said memorandum of arrangement, and to divers other persons, in divers sums, and was unable to pay the same in full: That the defendant, before the time of making the said memorandum of arrangement, and after the passing and coming into operation of the said statute, suspended payment; and thereupon a certain memorandum of arrangement, within the meaning and according to the provisions of the said statute, was made between the defendant of the first part, and the several persons whose names were thereunto subscribed (being respectively creditors of the defendant, or the authorized agents of such creditors) of the other part: That all things were performed and done as required by the said statute to make the said memorandum of arrangement an obligatory instrument within the terms of the said statute upon all the creditors of the defendant: That the plaintiffs were at the time of the making of the said memorandum of arrangement creditors of the defendant in respect of the causes of action in the declaration mentioned, within the provisions of the said Act; and that, after the said suspension of payment by the
*10] *defendant as aforesaid, and after the said memorandum of arrangement had been so signed as aforesaid, and before the issuing of the said scire facias, the plaintiffs had notice; and that he the defendant and the said parties of the other part had at all times since the making of the said memorandum of arrangement well and truly observed and performed in all respects the premises and agreements in the said memorandum of arrangement contained on their parts to be fulfilled and performed; and that, by reason of the premises, and by force of the said statute, the said memorandum of arrangement became and was and is obligatory on the plaintiffs as if they had duly signed the same.

Thirdly, that, after the commencement of the said action, the defendant compounded with his creditors, and that, after such compounding, by a certain order of Martin, B., made in the said action, upon hearing the attorneys or agents on both sides, it was ordered that the plaintiffs should be at liberty to sign judgment in the said action, with costs, to be taxed, and that the proceedings should be stayed on the costs being paid; that the said costs were afterwards, on the 18th of November, 1856, taxed by one of the masters at the sum of 7*l.* 19*s.* 2*d.*; that the defendant thereupon, and before the issuing of the said writ of scire facias, paid to the plaintiffs the said sum of 7*l.* 19*s.* 2*d.* for such costs; and that, except as in that plea before mentioned, he the defendant had not, after the commencement of the said action, compounded with his creditors within the meaning of or contrary to the said condition.

The plaintiffs joined issue on the several pleas.

They also demurred to the second plea, the ground stated in the margin being "that the second plea does not set forth or show the existence of any memorandum of arrangement operating as a bar to the scire facias."

*11] And, for a second replication to the third plea, the *plaintiffs said that the said order in that plea mentioned was and is in the words and figures and of the tenor and effect as follows, that is to say, —"Tabor and Others *v.* Edwards." Upon hearing the attorneys or agents on both sides, I do order that the plaintiffs be at liberty to sign judgment in this action for 500*l.*, with costs, to be taxed, and that the

proceedings be stayed upon costs being paid; and that the plaintiffs had not, nor had the said judge, at the time of the said order, knowledge or notice of the said compounding by the defendant with his creditors in the third plea mentioned.

The plaintiffs also demurred to the third plea, the ground stated in the margin being "that the said order in the third plea mentioned is no bar to the scire facias."

The defendant joined in demurrer, and demurred to the second replication to the third plea, the ground alleged being "that the said order in the third plea mentioned is a bar to the scire facias, whether Sir S. Martin at the time of the order had notice or not." Joinder.

Archibald, for the plaintiffs.(*a*)—The second plea is bad. *It is meant for a plea under the 224th section of The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which enacts "that every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) *be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same: and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy: Provided always, that every creditor shall be [*12 [*13

(*a*) The points marked for argument on the part of the plaintiffs, were,—

"*As to the second plea*,—that the defendant's second plea does not set forth or show any memorandum of arrangement which operates in any manner as a bar to the scire facias.

"That the allegation in the second plea, that a certain memorandum of arrangement was made within the meaning and according to the provisions of the Bankrupt Law Consolidation Act, 1849, without any further statement of the contents, substance, or effect of the said instrument, is wholly unmeaning; and that the provisions of the said deed ought to have been set forth in the said plea.

"That the said second plea is bad, inasmuch as it does not show that the said memorandum of arrangement was under seal, or contained any valid release of any of the debts or causes of action mentioned or referred to in the said plea; and that, unless under seal, such memorandum of arrangement would not be pleadable in bar.

"That the said second plea does not show that the said memorandum of arrangement was duly signed, according to the provisions of the said act, by six sevenths in number and value of the creditors of the defendant, or that three months had elapsed after notice to the plaintiffs of the defendant's suspension of payment, or that the plaintiffs ever had any such notice or knowledge of any application for a certificate of the due signature of the said memorandum, or that any such certificate was granted.

"And that the alleged memorandum of arrangement, being the breach of the condition of the said bond alleged in the declaration, cannot be set up by way of defence thereto."

As to the third plea,—"That the third plea is bad, inasmuch as a judge's order to stay proceedings in an action cannot be pleaded in bar of such action; and that it appears by the order as set forth, that it was not and could not have been meant to stay proceedings in respect of the breach now alleged."

As to the second replication to the third plea,—"That the second replication to the third plea is a sufficient answer thereto, and shows that the said order was only intended to apply to any breach of the said condition which had occurred prior to the issuing of the writ of summons in the said action, and had no application whatever to the breach now alleged."

accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The 225th section enacts "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement,—unless such trader shall within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid: and it shall be lawful for the court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment, to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application: and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid shall be bound thereby." Here, the second plea merely states that a certain memorandum of arrangement within the meaning and according to the provisions of the statute was made between the defendant and the several
*14] *persons whose names were thereunto subscribed, being creditors of the defendant;—not that it was a memorandum touching the defendant's liabilities, and his release therefrom, and the distribution, &c., of his estate; nor is there anything to show that it was a memorandum within the above sections, except the general averment "that all things were performed and done as required by the said statute, to make the said memorandum of arrangement an obligatory instrument, within the terms of the said statute, upon all the creditors of the defendant." If a form of plea had been given in the statute, that would have been intelligible enough: but, as it stands, the plea cannot be good unless it sets out the provisions of the deed, so that the court may see that it is a deed within the act. [CROWDER, J.—Might you not, if the facts would warrant it, have negatived the deed being in accordance with the statute?] It is for the defendant to make out a good defence to the plaintiff's claim. [CROWDER, J.—The plea does state that it is a deed of arrangement within the act.] It does not point to these sections; and there are other provisions in the act to which it might have been intended to apply: it might have been an arrangement made with the sanction of the court, under the 211th and subsequent sections. Whatever the effect of the general averment, it clearly cannot be held to amount to an averment that the period of notice had expired. In Bloomer *v.* Darke, 2 C. B. (N. S.) 165, it was held that a plea of arrangement under s. 224 is not good, unless it shows on the face of it that the deed is for the distribution of *the whole* of the debtor's estate, and enures for the benefit of *all* the creditors; and that the want of such specific averments in the plea is not supplied by the general allegation found in this plea. In the course of the argument in that case, Cress-
*15] well, J., observes, "The general words, 'that all matters and *things were done and happened,' &c., cannot surely be read 'all

words were inserted in the deed necessary to make it a compliance with the act.'" [WILLIAMS, J.—The plea is certainly very loose.] Even in Bloomer *v.* Darke the plea was much fuller than that in the present case. [WILLES, J.—The plea in that case did not show that the deed relied upon was a deed within the meaning of the act.] It has always been the practice to set out the terms of the deed. [WILLES, J.—It certainly was not so before the middle of the year 1855. The House of Lords in Larpent *v.* Bibby, 5 House of Lords Cases 481, decided that you must not look to the 224th section only, but that it must be made appear that the deed provides for the distribution of the debtor's property amongst *all* his creditors. That *is* stated here, by the general averment.] There was a general averment in Bloomer *v.* Darke. [WILLES, J.—Not that the deed was in accordance with the provisions of the statute; but that "all matters and things were done and happened according to the said act, to make the deed, and the said release therein contained, as effectual and obligatory in all respects upon the creditors, including the plaintiff, who did not sign the said deed, as if they had duly signed the same."] It may be that the deed is conditional on the estate proving sufficient to pay all the creditors 20*s.* in the pound; or it may not contain a release. [WILLES, J.—That is a better point: it might be only a letter of license for two years.] Exactly so. [CROWDER, J.—If it is a deed under the 224th section of the 12 & 13 Vict. c. 106, it must contain a release: if not, should you not have replied it?] To constitute a defence to the action, the deed must amount to a release or a bar, and that should appear by the plea. The third plea sets up a stay of proceedings by judge's order. No action lies for disobedience of a judge's order: the remedy is by attachment: Dent *v.* *Basham, 9 Exch. 469†,—even [*16 though the order be made by consent: Hookpayton *v.* Bussell, 10 Exch. 24.† The converse is equally true, viz., that it cannot be used as a defence to an action. The second replication to the third plea is unexceptionable.

Malcolm, contrà.(*a*)—The second plea sets out that which, if proved, affords a complete answer to the action. A "memorandum of arrangement" under the statute need not be by deed. [WILLES, J.—If the plea had gone on to say, "and whereby it was agreed that the defendant should be released and discharged from all his debts," &c., the difficulty now suggested could not have arisen. If you will not put in an averment of that sort, we cannot help thinking that the deed is no release.] The

(*a*) The points marked for argument on the part of the defendant, were as follows:—

"That the declaration shows no cause of action; the stipulation in the contract, that the defendant should not compound or attempt to compound with his creditors, being illegal and contrary to the policy of the bankrupt laws:

"That the second plea does set forth and show a memorandum of arrangement which operates as a bar to the scire facias:

"That the allegation in the second plea, that a certain memorandum of arrangement was made within the meaning and according to the provisions of the Bankrupt Law Consolidation Act, 1849, without any further statement of the contents, substance, or effect of the said instrument, is sufficient; and that, if the plaintiffs contended that the contents, substance, or effect of the said instrument were not in accordance with the provisions of the said act, they ought to have set out the said instrument in terms, and demurred thereto:

"And that the Bankrupt Law Consolidation Act, 1849, does not require a memorandum of arrangement to be made by deed, or under seal, and a memorandum of arrangement under the said act is pleadable in bar, though not under seal."

*17] plea does so allege in general terms. It could *not have been a statutory suspension of the right of action for a limited time; for, that would not be a "memorandum of arrangement" within the statute at all,(a) which the plea expressly avers this deed to have been. [WILLIAMS, J.—Would a letter of license for two years be a bar?] That would not be within the 224th section. The allegation here is altogether inconsistent with anything short of a deed or memorandum under that section. The ordinary deed of inspection is not the thing there contemplated. [WILLIAMS, J.—It is much to be regretted that we do not know what the deed really is. *Archibald* intimated that he had ascertained that there was nothing in the deed which could make the plea any better.] As to the third plea,—the instrument there referred to is something more than a mere judge's order: it amounts to an accord and satisfaction, sanctioned by the judge.

Archibald, in reply.—No answer has been given to the objection, that, for anything that appears upon the face of the second plea, the deed may not have contained an absolute release. In a case now pending in the Exchequer,—Irving *v.* Gray,—that court treated a deed of inspection as being within the 224th section. [CROWDER, J.—How do they deal with Tetley *v.* Taylor, 1 Ellis & B. 529?] No judgment has yet been delivered.(b)

WILLIAMS, J.—We entertain no doubt as to the third plea being a bad *18] one. The second, however, raises an *important question, as to which it is desirable that we should take time to consider.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the Court:—

Upon the argument of this demurrer, the court entertained some doubt as to the construction of the 224th section of the 12 & 13 Vict. c. 106, with reference to the decisions as to whether, in cases of arrangements within that section, there must be an express assignment on the part of the insolvent of all his estate and effects. But we think it unnecessary to consider that question, because we are of opinion, that, assuming it to be requisite to the validity of the deed or memorandum of arrangement under that section that there should be an assignment by the debtor *19] of *all* his *property, such a deed or memorandum might be valid notwithstanding that it should not operate as a bar to an action

(a) See Tetley *v.* Taylor, 1 Ellis & B. 529, Larpent *v.* Bibby, 5 House of Lords Cases 481.

(b) Irving *v.* Gray has since been reported in 3 Hurlst. & N. 34.† The way in which the court, in giving judgment, deal with Tetley *v.* Taylor, is as follows (p. 90): "We agree that the trusts of the deed must be such as to enure for the distribution of all the debtor's estate and effects amongst all his creditors. This court, in Drew *v.* Collins, 6 Exch. 670,† and the Court of Common Pleas in Bell *v.* Fisher, 12 C. B. 363, decided that a deed of arrangement must provide for a distribution of all the trader's estate amongst all his creditors. The Court of Exchequer Chamber in the case of Tetley *v.* Taylor, 1 Ellis & B. 529,† on a writ of error brought upon a decision of the Court of Queen's Bench, decided the same. This question was much discussed in the House of Lords, in the case of Larpent *v.* Bibby, 5 House of Lords Cases 481. It was not, however, then determined. The judges who heard the argument were not altogether agreed upon this point, and the case was decided on another ground. The Court of Common Pleas has, since the case of Larpent *v.* Bibby, viz., in the case of Bloomer *v.* Darke, 2 C. B. (N. S.) 165, held that a plea of arrangement under the 224th section is not good unless it shows on the face of it that the deed is for the distribution of the whole of the debtor's estate, and enures for the benefit of the whole of the creditors. *No part of the trader's property is in terms, or, as we think, by necessary implication, excluded from the operation of the present deed, as was the case in Drew v. Collins and Tetley v. Taylor.*"

by a creditor. It is therefore quite consistent with the allegation in the third plea that the deed or memorandum of arrangement therein referred to contains nothing which can operate as a bar to the action; and, consequently, the plea is no answer. As there is nothing in the plea to inform us what are the contents of the deed, we cannot hold it to be a bar to the action. In addition to this, the court are by no means satisfied,—though it is unnecessary to give any decided opinion upon the point,—that the plea is not bad, on the ground that it fails to satisfy the requirements of the 224th section, in this, that it does not allege that the notice was given as required by that section, for, it is at the best extremely doubtful whether the general averment is not consistent with the thing not having been done within the time prescribed by the 224th section.

For these reasons, we are of opinion that our judgment must be for the plaintiffs. Judgment for the plaintiffs.

*POPPLETON *v.* BUCHANAN. [*20

BUCHANAN *v.* POPPLETON. *Feb.* 10.

By the particulars on a sale by auction of freehold land, the property was described as "land-tax redeemed." The only evidence of that fact, was, a statement in the witnessing part of a conveyance (dated in 1844,—*twelve years* before the date of the sale) from one Mears to one Humphreys (from whom the property came by various mesne assignments to the vendor), in which the then vendor acknowledged to have received the amount of the purchase-money for the purchase of the premises "and the fee-simple and inheritance thereof in possession, *free from land-tax* and all other encumbrances," and a statutory declaration by Mears, to the effect, that to the best of his knowledge and belief, no land-tax had ever been paid for or in respect of the land "subsequently to the purchase *or* redemption thereof in or about the year 1799:"—

Held, that this was not such evidence of the fact of the land-tax having been redeemed, as to entitle the vendor to insist upon a completion of the purchase,—notwithstanding a condition which provided that "every deed and entry on or copy of court roll dated more than *ten years* ago shall be conclusive evidence of everything recited or stated therein:" for, that this was not a direct statement or recital of *the fact* that the land-tax had been redeemed, but only an acknowledgment by the then vendor that the then purchaser had paid a certain sum for the land as being free of land-tax and other encumbrances; and it was consistent with such statement that the land-tax had not been *redeemed*, but that it had been *purchased* or assigned to the then purchaser, or to a trustee for him, in whom or in whose representatives it might still be vested.

And held, that the purchaser was entitled to recover back the deposit with interest, and the costs of investigating the title.

***Quære*, whether this was not properly the subject of compensation, under the ordinary condition for that purpose?**

THE following case was stated for the opinion of the court, pursuant to a judge's order.

On the 1st of August, 1856, Dr. Andrew Buchanan caused to be put up for sale by auction the house and premises described in Lot 1 of the particulars of sale as "a recently erected modern detached residence" (describing it).

"The land comprises in all 29*a.* 1*r.* 31*p.* (more or less), divided into convenient enclosures, as follows:—

No. on tythe map.	Description.	Cultivation.		Quantity.					
				a.	*r.*	*p.*	*a.*	*r.*	*p.*
227A.	House, Lawn, &c. (part of)	. . .	In hand.	0	0	35			
226A.	Ditto Ditto	. . .	. . . . .	0	2	27			
231A.	Stable yard.	. . .	. . . . .	0	1	14			
227	The Mead	Pasture	. . . . .	3	2	14			
217	King's Head field . . .	. . .	. . . . .	4	3	37	9	3	7
232A.	Part of Round Hill Meadow	. . .	Let to Mr. Humphreys. .	0	0	35			
218	The Seven Acres	Pasture	. . . . .	5	3	21			
219	Spring Hill	do.	. . . . .	4	2	39			
220	Baker's Grove.	Arable	. . . . .	6	3	26			
226	Little Two Acres	Pasture	. . . . .	1	3	23	19	2	24
							29	1	31

*21] *"The house, part of garden, and carriage drive, coloured pink on plan, are freehold. The remainder of the property is copyhold of the manor of Chingford St. Paul's, subject to an annual quit-rent of a few shillings, and the usual fines on death or alienation. Nos. 219 and 220 are heriotable.

"Of the residence, garden, yard, and two meadows (in all 9*a.* 3*r.* 7*p.*), possession will be given on completion of the purchase; the remainder, together with the whole of Lot 2, is let on lease to Mr. Humphreys, for a term which will expire at Michaelmas, 1859, at the very low rental of 95*l.* per annum. The rent apportioned in respect of the part of Lot 1 now occupied by him (being 19*a.* 2*r.* 24*p.*), is 40*l.* The apportioned quit-rent on this lot is 14*s.* 3*d.* The purchaser of Lot 1 shall hold Mr. Humphrey's lease. The purchaser of Lot 2 can have an attested copy, at his own expense."

The sale was subject to certain conditions;(*a*) and at such sale Rich-

(*a*) *Conditions of sale.*—"1. No person shall at any bidding advance less than 10*l.* No bidding shall be retracted; the highest bidder shall be the purchaser, and, if any dispute arise concerning the bidding for either lot, the same shall be put up again and resold.

"2. The purchaser of either lot shall immediately after the sale, pay a deposit of 20 per cent. of his purchase-money into the hands of the auctioneer, and sign the subjoined agreement.

"3. The fixtures belonging to the vendor in Lot 2 will be included in the purchase of that lot. The fixtures in the house, and the iron hurdles, &c., in the grounds on Lot 1 (according to an inventory which will be produced at the sale), shall be paid for by the purchaser at a valuation to be made by two valuers, one to be nominated by each party, or by their umpire, in the usual manner. The purchaser of Lot 1 shall have the privilege of taking at a valuation, to be similarly made, all or any of the furniture in the said house, the vendor reserving to himself the right of selling on the premises at any time before the completion of the purchase of Lot 1, such furniture as the purchaser shall not within 21 days after the sale have signified in writing to the auctioneer his intention so to take.

"4. The purchaser of each lot will be entitled to the benefit of all the forest rights appurtenant thereto: the said rights are believed to be the right of depasturing or turning upon the forest two cows or one horse to every 40*s.* of rental, and the purchasers shall accept as conclusive evidence thereof the evidence which satisfied the vendor on his purchase in 1850 of part of the property now offered for sale, viz., a declaration on the subject by the then out-going tenant, who in such declaration states that he had occupied his farm for twenty-one years and upwards.

"5. The titles to Lot 2 and to such part of Lot 1 as is copyhold, shall commence with the admittances of Charles Smith and Drummond Smith respectively on the 19th of May, 1815; the earlier titles will not be shown, and shall not be investigated. Upon the admittance in 1850 of a former owner of part of the property, an annual sum of 17*s.* 6*d.*, stated to be part of a quit-

ard Poppleton became the highest bidder *for the same, at the sum of 2500*l.*, and entered into and signed a written contract for [*22 the purchase thereof, in the *form set forth in the copy of the particulars, and at the same time paid the sum of 500*l.* as a deposit, pursuant to the said conditions. [*23

rent of 1*l.* 10*s.* 8*d.*, was apportioned as the part to be payable in respect of such property; and the purchaser shall assume that the property is subject to no more than such apportioned part.

"6. The purchaser shall assume that every former owner of any part of the property whose widow (if any) would have been entitled to dower or free-bench, and is not mentioned in the title, did not leave a widow.

"7. *Every deed and entry on or copy of court-roll dated more than ten years ago, shall be conclusive evidence of everything recited or stated therein.*

"8. The production, inspection, and examination of, and the making and furnishing official or other copies of, or extracts from, all deeds, documents, court-rolls, wills, letters of administration, maps, registers, evidences or muniments of title not in the vendor's possession, and any information not in the vendor's knowledge, whether required for the completion or verification of the title or abstract, or for any other purpose, shall be procured, made, and obtained by and at the expense of the purchaser requiring the same; and such purchaser shall also bear the expense of all journeys and searches for any of the above purposes.

"9. The quantities of the estate as set forth in the particulars, are taken from the tithe commutation appointment, and shall be assumed by the vendor and purchaser as correct; and, inasmuch as it is considered that the property is sufficiently identified with the descriptions thereof in the deeds, court-rolls, and other documents of title, by a map dated about the year 1800 (an extract from which is in the possession of the vendor, and for the production of the original of which he holds a deed of covenant), the purchaser shall not be entitled to any other evidence of identity than the said map.

"10. Each lot is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to all fines, heriots, services, chief and other rents, rights of way and water, and other easements (if any) charged or subsisting thereon.

"11. The purchaser of each lot shall pay the remainder of his purchase-money, and the purchaser of Lot 1 shall also pay the amount of the valuation aforesaid, on the 29th day of September next, at the office of Mr. Buchanan, the vendor's solicitor, or to the vendor, or as he shall direct; and, upon such payment, the vendor and all other necessary parties (if any) will make and execute proper conveyances, surrenders, and assurances of such property to the purchasers, who shall bear all the cost and expenses of and incidental to such conveyances, surrenders, and assurances, except the costs of the perusal and execution by the vendor of the necessary deeds.

"12. The rents or possession will be received or retained, and the outgoings discharged, by the vendor, up to the said 29th day of September next; and as from that date the outgoings shall be discharged, and the rents and possession taken by the purchasers, and such rents and outgoings shall (if necessary) be apportioned between the vendor and purchasers for the purpose of this condition. If from any cause whatever either purchase shall not be completed on the 29th day of September next, the purchaser shall pay interest on the remainder of his purchase-money after the rate of 5 per cent. per annum, from that day, until the purchase shall be completed.

"13. The purchaser of Lot 1, the greater part whereof is held under the same title as Lot 2, shall be entitled, after the completion of the sale of both lots, to the custody of the muniments of title comprising the same, and shall enter into the usual covenants with the purchaser of Lot 2 for the production and furnishing copies of such muniments, such covenants to be prepared by and at the expense of the purchaser of Lot 2, if he shall require the same; and, inasmuch as the vendor has entered into a covenant with an owner of other property, held under the same title, for the production of some of the muniments of title relating to the freehold portion of Lot 1, the purchaser to whom those muniments shall be delivered as aforesaid, shall, if and as required, enter into a covenant with the vendor for the production and furnishing copies of such muniments. Every or any such last-mentioned covenants shall be prepared by and at the expense of the vendor, but shall be perused on behalf of, and executed by, the intended covenantor at his own expense. If either lot shall not be sold at this sale, the vendor will retain, until all the property shall be sold, such of the aforesaid muniments as do not relate exclusively to the lot sold; and the purchaser of the lot sold shall in the mean time be entitled, at his own expense, to the production of the muniments so retained, and to copies of them, but not to a covenant for that purpose.

"14. The purchasers shall make their objections and requisitions (if any) in respect of the title, and of all matters appearing on the abstract, particulars, or conditions, and send the same

*24] *In due time, on the 6th of August, 1856, the said Andrew
*25] Buchanan delivered an abstract of his title to *the said Richard Poppleton, of Lot 1, part of which was freehold and part copyhold. The title to the freehold portion only is in question.

As to the freehold portion, it commenced with the abstract of a conveyance dated the 18th of October, 1844, of which portion of the abstract the following is a copy:—

*26] *"1844. October 18th. By indenture of this date, made between John Mears, of Bagshot, in the county of Surrey, gentleman, of the first part, W. F. Snell, of Milford, in the county of Southampton, esquire (eldest son and heir-at-law of Thomas Snell, deceased, and sole residuary devisee in fee named in the said will), of the second part, Jeremiah Humphreys, of Chingford, in the county of Essex, farmer, of the third part, and J. B. Gibbons, of, &c., of the fourth part,—reciting that the said Thomas Snell, being at the respective times of making his will and of his decease seised in fee-simple of, or otherwise well and sufficiently entitled to (amongst other estates), the piece or parcel of land or ground, messuage, or tenement and premises in the abstracting indenture described and released, with the appurtenances, duly made and published his last will and testament in writing, bearing date the 24th of August, 1833 (executed and attested as the law then required for the devise of real estates), and thereby gave and devised his several estates situate in the parish of Chingford, in the county of Essex, to the use and intent that his wife Barbara Snell (since deceased)

to the office aforesaid within twenty-one days from the day of the delivery of the abstract; and, in default of any such objections and requisitions (if none), and subject to such (if any), shall be deemed to have accepted the title, and to have waived all other objections and requisitions; and, if either purchaser shall insist on any objection or requisition as to the title or abstract, or evidence of title, particulars, conditions, conveyance, surrender, or otherwise, which the vendor shall be unable or unwilling to remove or comply with, the vendor may by notice in writing to be given to the purchaser or his solicitor at any time, and notwithstanding any negotiation or litigation in respect of such objection or requisition, annul the sale, and shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatever.

"15. If either purchaser shall fail to comply with the above conditions, his deposit shall thereupon be forfeited, and the vendor shall be at liberty to resell the property bought by such purchaser, either by public auction or private contract, at such time and place, and subject to such conditions, and in such manner, as the vendor shall think fit; and any deficiency in price which may happen on such second sale, and all expenses attending such sale, shall immediately after such sale be made good and paid to the vendor by the defaulter at this present sale; and, in case of non-payment, the whole or such part of the same deficiency and expenses as shall not be paid, shall be recoverable by the vendor, as and for liquidated damages."

"*Memorandum.*—I, Richard Poppleton, of, &c., do hereby acknowledge myself to be the purchaser of Lot 1 described in the within particulars, at the auction held this 1st day of August, 1856, at the sum of two thousand five hundred pounds; and I have paid five hundred pounds as a deposit and in part payment of the said purchase; and I hereby contract and agree with the vendor, for myself, my heirs, executors, administrators, and assigns, to complete the purchase of the same in every respect agreeably to the within particulars and conditions of sale. Witness my hand this 1st day of August, 1856. "RICHARD POPPLETON."

"Amount of sale	£2,500 0 0
"Deposit	500 0 0
"Balance	£2,000 0 0

"As agent for the above-named vendor, I hereby acknowledge to have sold Lot 1 to the above-named Richard Poppleton, and to have received the deposit as specified above.

"F. G. DEBENHAM.

"Witness, "S. N. DEBENHAM."

and her assigns, should receive thereout during her life one annual sum or yearly rent-charge of 400*l.* payable as therein mentioned; and, subject and charged as before mentioned, the said testator gave and devised his said real estates at Chingford, and all and singular other his real estate whatsoever and wheresoever, and whether in possession, reversion, remainder, or expectancy, and which he had any power to devise or appoint, with their appurtenances, to the use of James Scott, of, &c., the Rev. Thomas Newcome, of, &c., and the said John Mears, their executors, administrators, and assigns, for the term of one thousand years, to commence and be computed from the day of the said testator's death, without impeachment of waste, upon certain trust *therein declared, and for raising portions and maintenance for the younger children [*27 of the said testator; and, from and after the expiration or other sooner determination of the said term of one thousand years, and in the mean time subject thereto and to the trusts thereof, to the use of his eldest son, the said W. F. Snell, his heirs and assigns, for ever; and in the said will is contained a proviso, that, notwithstanding anything thereinbefore contained, it should be lawful for the trustee or trustees for the time being of that his will, within twenty-one years from his decease, absolutely to sell and dispose of all or any part of his said real estates for the purpose of raising and paying all or any part of the moneys thereby directed to be raised under the trusts of the said term of one thousand years, if they or he should think fit, such sales to be either by private contract or public auction; and the said testator declared that the receipt or receipts in writing of the said James Scott, Thomas Newcome, and John Mears, and the survivors and survivor of them, for any sum or sums of money payable to them or him under or by virtue of the trusts of the said will should be a sufficient and effectual discharge for the same respectively, or for so much thereof as in such receipt or receipts should be expressed or acknowledged to be received, and that the person or persons to whom the same should be given, his, her, or their heirs, executors, administrators, or assigns, should not afterwards be answerable or accountable for any loss, misapplication, or non-application of the money therein mentioned and acknowledged to be received: and the said testator appointed the said James Scott, Thomas Newcome, and John Mears executors of his said will: And reciting "that the said testator departed this life in or about the month of February, 1843, without having altered or revoked his said will, otherwise than by a codicil *bearing date the 6th of July, 1840, but not affecting the [*28 devise in the abstracting indenture recited; and the said will and codicil were, on or about the 4th of April, 1843, duly proved in the Prerogative Court of Canterbury by the said John Mears alone: And reciting, that, by a deed-poll under the hands and seals of the said James Scott and Thomas Newcome, bearing date the 27th of September, 1843, the said James Scott and Thomas Newcome absolutely and irrevocably disclaimed and renounced all and singular the trusts, &c., intended to be vested in them by virtue of the said will and codicil jointly with the said John Mears, and also disclaimed and renounced the aforesaid nomination and appointment of them the said James Scott and Thomas Newcome to be executors of the said will, to the intent that the trusts and powers might be exercised by the said John Mears alone, and that all the said estates and interests of the said executorship might be vested

in and exercised by him alone: And reciting that the said Barbara Snell, the widow of the said testator, departed this life in or about the month of February, 1843, and that, in pursuance and exercise of the power for that purpose contained in the said recited will, the said John Mears, with the privity of the said W. F. Snell, caused the said piece or parcel of land or ground, messuage or tenement, and premises in the abstracting indenture after described and released (with other hereditaments) to be put up to sale by public auction at the Auction Mart in the city of London, on the 25th of June then last, in several lots; at which said sale the said Jeremiah Humphreys attended, and, being the highest bidder for, was declared purchaser of, Lot 12 at the said sale, comprising the said piece or parcel of land or ground, messuage or tenement, and premises in the abstracting indenture comprised and released, and the inheritance
*29] in fee-simple, free from all *encumbrances, at or for the price or sum of 290*l.*: And reciting that the said W. F. Snell had, at the request of the said Jeremiah Humphreys, consented to concur in the conveyance of the said piece or parcel of land or ground, messuage or tenement, and premises in the abstracting indenture mentioned,—It was witnessed, that, in order to carry into effect the said sale and in consideration of the sum of 290*l.* of lawful British money to the said John Mears, as such trustee as aforesaid, in hand paid by the said Jeremiah Humphreys, at, &c., the receipt, &c., and that the same was in full for the absolute purchase of the said premises by the abstracting indenture described and released, and the fee-simple and inheritance thereof in possession, *free from land-tax and all other encumbrances*, and in consideration of 10*s.* of like lawful money to the said W. F. Snell, paid by the said Jeremiah Humphreys, the receipt, &c., the said John Mears, as such acting trustee as aforesaid, and in exercise and execution of the power or authority for that purpose given, limited, or reserved to him by the said recited will of the said Thomas Snell, deceased, and of all and every other power and authority, powers and authorities, in him vested, or him thereto enabling, and also for the purpose of assigning the said term of one thousand years to merge in the freehold and inheritance of the said premises, did (by abstracting indenture made in pursuance of the 4 & 5 Vict. c. 21) bargain, sell, release, and convey, and also surrender and yield up, and the said W. F. Snell (as such heir-at-law and devisee as aforesaid, and by way of conveyance and confirmation only, and not of covenant or warranty) did bargain, sell, alien and release, ratify and confirm unto the said Jeremiah Humphreys, his heirs and assigns, all that piece or parcel of land or ground containing half an acre and one perch (more or less), situate and being near a certain house called
*30] or known by the *name or sign of the King's Head public-house, at Chingford Green, in the parish of Chingford, in the county of Essex, abutting, &c., together with the messuage or tenement, stable, coach-house, two cottages, and all other erections and buildings thereon, as the same were then lately held under a lease thereof granted to one John Marshall, dated the 9th of September, 1782, for the term of sixty-one years, and which lease had recently expired, and all and singular the rights, members, and appurtenances to the said piece or parcel of land or ground, messuage or tenement, and other the premises by the abstracting indenture released, or intended so to be, belonging, or in any wise appertaining, or to or with the same, or any part thereof, then

or at any time usually had, held, used, and occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, and the reversion, &c., and all the estate, &c., to hold unto the said Jeremiah Humphreys, his heirs and assigns, to the uses, upon the trusts, and for the ends, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, and generally in such manner and form as the said Jeremiah Humphreys, by any deed or instrument in writing to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, should from time to time direct, limit, or appoint, and, in default of any and subject to every such direction, limitation, or appointment, or so far as the same, if incomplete, should not extend, to the use of the said Jeremiah Humphreys and his assigns, during the term of his natural life, without impeachment of waste, remainder to the use of the said J. B. Gibbons and his heirs during the natural life of, and in trust for, the said Jeremiah Humphreys and his assigns; and, after the determination of that estate, to the only proper use and behoof of the said Jeremiah Humphreys, his *heirs and assigns, for ever. Declaration by the said Jeremiah Humphreys to bar dower. Covenants by John Mears and W. F. Snell respectively, and for their respective heirs, executors, and administrators, with Jeremiah Humphreys, his heirs and assigns, that they had done no act to encumber." [*31

This was a correct abstract of that deed: and the abstract then set forth the abstract of another deed, dated the 24th of May, 1845, from which the following is an extract:—

"Indenture of release, made in pursuance of an act of parliament, &c., between the said Jeremiah Humphreys, of the first part, the said J. B. Gibbons, of the second part, William Dunsford, of the third part, and George Baker, of the fourth part, reciting the said indenture of the 18th of October, 1844, and which recital is as follows,—'Whereas, by an indenture (made in pursuance of the said act), bearing date the 18th of October, 1844, and made between John Mears, of the first part, W. F. Snell, of the second part, the said Jeremiah Humphreys, of the third part, and the said J. B. Gibbons, of the fourth part, the hereditaments and premises thereinafter particularly mentioned, and intended to be thereby granted and released, with their appurtenances, were, for the valuable considerations therein mentioned, conveyed and assured to the use of such person or persons for such estate and interest, upon such trusts, and for such ends, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, and generally in such manner and form, as the said Jeremiah Humphreys, by any deed or instrument in writing to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, should from time to time direct, limit, or appoint; and, in default of, and subject to every such direction, limitation, or appointment, and so far as the same if *incomplete should not extend, to the use of the said Jeremiah Humphreys and his assigns for and during the term of his natural life, without impeachment of or for any manner of waste; with remainder to the use of the said J. B. Gibbons and his heirs during the natural life of and in trust for the said Jeremiah Humphreys and his assigns; with remainder to the only proper use and behoof of the said Jeremiah Humphreys, his heirs and assigns, for ever," &c. [*32

The abstract then set forth various conveyances, terminating with a conveyance to the said Andrew Buchanan, dated the 2d of April, 1849.

On the 8th of August, 1856, the said Richard Poppleton's solicitors wrote a letter to the said Andrew Buchanan's solicitor, of which the following is a copy:—

"8th August, 1856.

"Chigwell Estate. Lot 1.

"Be pleased to send us the earlier title to the freehold property. The abstract delivered commences with a deed dated only in 1844."

On August 9th, the following reply was sent by the solicitor of the said Andrew Buchanan:—

"9th August, 1856.

"Chigwell Estate. Lot 1.

"We have no earlier title than 1844: and, if you still require it, it must be at your client's expense, in accordance with the 8th condition of sale."

On the same day the following reply was sent to the last letter:—

"Chigwell Estate. Lot 1. Poppleton and Buchanan.

"We wholly differ from you as to the construction which you put upon the 8th condition. We shall lay the papers at once before our conveyancer; but it must be understood that we call upon the vendor, at his own expense, to furnish a proper abstract of title to the freehold portion of the property."

*33] *On the 14th of August, one of the solicitors of the said Richard Poppleton attended at the office of the solicitor of Andrew Buchanan, for the purpose of comparing, and compared, the abstract with the deeds abstracted.

Ultimately, on the 23d of August, 1856, the solicitor of Andrew Buchanan received from the solicitors of Richard Poppleton certain objections and requisitions to the said title, of which, so far as they are material, the following is a copy:—

"Requisition 1. The vendor must carry back the title to the freehold portion of Lot 1 to a proper and earlier date; and the purchaser requires the earlier title. The 8th condition has no bearing upon the subject, since it conveys no intimation to the purchaser that his rights as to length of freehold title are to be limited. The very fact that the period at which the copyhold title is to commence is fixed, would naturally lead to the conclusion that a distinction was to be drawn between it and the freehold title, and that, as to the latter, the ordinary rules were to prevail.

"16. *There is no evidence in the abstract, of the redemption of the land-tax.* The vendor should furnish the proper abstract to show that the land-tax has been redeemed.

"23. The purchaser reserves to himself the right to make any further requisitions and observations which may arise upon the earlier abstract of title to the freehold part of the property, when the abstract is furnished, or upon the answers to the present observations and requisitions, or upon the searches for encumbrances."

To the portion of the abstract of the title subsequent to the conveyance of the 18th of October, 1844, above referred to, no objection arises; and it was agreed that the said Andrew Buchanan deduced such a title

to the *freehold to himself from the last-mentioned deed of 1844 as he was bound to do by the conditions of sale, subject to the objections and requisitions set forth in this case. [*34

To these objections and requisitions, on the 1st of September, 1856, the solicitor of Andrew Buchanan delivered the following answers to Mr. Poppleton's solicitors:—

"Reply 1. The vendor has already shown such a title to the freehold portion of Lot 1 as by the conditions of sale he undertook to show. He has, under the 7th condition, furnished the purchaser with conclusive evidence that Thomas Snell, the testator of 1833, was, at the date of his will, and at his death, seised in fee; and he has deduced a title and shown a possession consistent with his seisin for more than twenty-three years subsequent to that date. The production of earlier deeds showing how Snell acquired the property, even if the vendor had (which he has not) any such in his possession, could not prove the seisin in fee of Thomas Snell more incontrovertibly than the vendor has by means of the 7th condition already proved it. The chief object of the 5th condition was, to guard the vendor against requisitions on his title to the copyholds, founded on information obtained aliunde, *e. g.* from searching the court-rolls of an earlier date than 1815. With regard to the freehold, this necessity did not of course exist. The vendor is unable to comply with, and, under the circumstances, declines to entertain, this requisition.

"Reply 16. An abstract of the land-tax-redemption certificate of the copyholds is sent herewith. As to the freehold, the deed of 1844 recites that it is free from land-tax. There is also the declaration by Mears, in 1844, that none had ever been paid subsequently to the purchase or redemption thereof in 1799: and the vendor has never paid any."

*In the mean time, Mr. Poppleton instructed Mr. Debenham, the auctioneer, to procure a purchaser from him of the property, if he could, at a profit; which Mr. Debenham tried to do on Mr. Poppleton's behalf, but could not succeed. Mr. Poppleton also offered to sell the lot to one Alcock, for an advance in price, but which Alcock declined to give. [*35

The purchaser's solicitors still insisting that a proper title had not been deduced, on the 22d of October, 1856, Mr. Buchanan, the solicitor of Andrew Buchanan, sent to Mr. Poppleton's solicitors a letter and an abstract, of which the following are copies:—

"Buchanan and Poppleton.

"On again going through the papers herein, I have found counterpart of an old expired lease, granted in 1782, an abstract of which I send you, without at all admitting your right to call for it, but simply with a view of avoiding litigation: and I must request that you will have the goodness to complete the purchase without further delay."

"1782. September 9th. Counterpart indenture of lease of this date, made between William Snell, of, &c., committee of the estate and effects of his brother John Snell, of, &c., a lunatic, and the eldest brother and heir-at-law of the said John Snell, of the one part, and John Marshall, of, &c., of the other part,—reciting, that, by a memorandum in writing, bearing date the 16th of April then last, entered into between and signed by the said William Snell and John Marshall, in consideration of the said John Marshall agreeing to build a substantial brick building or

dwelling-house as should be valued when finished at 200*l.*, exclusive of out-houses, on the ground therein and hereinafter mentioned to be demised, he the said William Snell did, amongst other things, agree with the said John Marshall, to grant unto him a building lease of the
*36] said piece or parcel of *ground for the term of sixty-one years from Michaelmas Day then next, at the yearly rent of 2*l.*, and to fence in nineteen rods of the said ground in manner therein mentioned; and reciting that the said John Marshall, in pursuance of the agreement on his part contained in the said memorandum in writing, had begun and made a great progress in the erection of a brick dwelling-house and premises on the before-mentioned piece of ground, on a scale the completion whereof would fully cost or exceed the sum of 200*l.* mentioned in the said memorandum, exclusive of out-houses; and reciting that the said W. Snell had completed and finished the said nineteen rods of fencing, or as much thereof as was requisite for the completely fencing in the said piece of ground in the manner and on the sides expressed and intended by the said memorandum,—it was witnessed that the said W. Snell, in consideration of the premises, and in full performance and execution of the said agreement on his part, and in consideration of the rents and covenants thereinafter reserved and contained on the part of the said John Marshall, did demise and lease unto the said John Marshall, his executors, administrators, and assigns, all that piece or parcel of land or ground, containing half an acre and one perch, little more or less, situate and being near a certain house commonly called or known by the name or sign of 'The King's Head,' at Chingford Green, in the county of Essex, abutting, &c., together with the erections and buildings thereafter to be erected thereon; and all ways, &c.; to hold the same, with the appurtenances, unto the said John Marshall, his executors, administrators, and assigns, from the Feast day of St. Michael the Archangel then next ensuing the date thereof, for the term of sixty years, at the yearly rent of 2*l.*, and subject to the covenants therein contained. Counterpart executed by the said John Marshall, and attested."

*37] *The following correspondence then ensued between the solicitors of Mr. Poppleton and Mr. Andrew Buchanan:—

The purchaser's solicitors to the vendor's solicitor,—"1856. October 26th. The further abstract which you have now supplied does not remove our objections to the want of a proper abstract of title of the freehold. 1st. It does not appear that the Thomas Snell named in the recital of the deed with which your former abstract commenced, is the same person as is named in the will of the testator of 1816; but, if so, there is no abstract of the will under which he is said to be devisee. 2. There is nothing to show that W. Snell (whose will is abstracted in the most meagre form, and is not stated to be attested) was ever seised of this property, or that it passed by his will. 3. The abstract of the counterpart lease, so far as it proves anything, goes to show that John Snell (the lunatic brother, who is confused with John Snell the father) was the owner of this property in 1782; and there is no attempt in the abstract to deduce the title of the property (now purchased) from John Snell to the testator of 1816. The time within which the vendor was bound (by necessary implication from the eleventh condition) to deliver a proper abstract, having now expired, as well as the time named in our letter of the 11th of October, we must decline to continue the negotia-

tion, unless you expressly waive the provisions of the fourteenth condition, as to interest, costs, and compensation. In the event of your not doing so within three days from the date of this letter, we shall feel it necessary, without further notice, to commence an action for the recovery of the deposit, and shall hold the vendor liable for interest and costs from the time of his refusal to annul the sale and return the deposit.

"Should you think fit to forward us any further *abstract, we beg that you will at the same time state, for our information and [*38 guidance, whether or not you insist on the application of the eighth and fourteenth conditions either to such further abstract or to the last abstract delivered to us, or whether you deliver such abstract subject to the ordinary rules as to costs attending perusal and verification."

Reply thereto. "1856. October 27th. 1. Thomas Snell named in the recitals of the deed of 18th of October, 1844, is the same person who is named in the will of the testator of 1816; and, if you wish for an abstract of his will, though you now require it for the first time, I will furnish it. 2. The declaration of John Mears, 11th October, 1844, which I showed to you long since, and a copy of which I now send you, expressly proves that William Snell by his will devised this property to his son Thomas; therefore he must have been seised of it, and it must have passed by his will. 3. There is no confusion in the abstracts furnished to you, between John Snell the lunatic, or any other person. The lunatic, as appears by the lease, was seised of the property in 1782; and his brother, William Snell, the testator of 1816, was, as appears also by the lease, his heir-at law. I have no further information on the subject than that which I have already furnished and shown to you; and, if you wish for further evidence or information, I will, at your expense, endeavour to supply it: but I will not waive the eighth or the fourteenth condition of sale; nor do I admit your right to ask for any other title than that I have shown. I maintain that I have conclusively proved a good title to the whole property sold to you; and, if you wish to contest the point, I beg that you will at once, and without waiting three days, as you propose, commence an action for the deposit: and I give you notice, that, if you fail to complete the *purchase, I shall avail myself of [*39 the fifteenth condition, and resell the property at your risk, &c."

The following is a copy of the declaration referred to, and enclosed in the last-mentioned letter:—

"Whereas, William Snell, late of Salisbury Hall, in the parish of Shenley, in the county of Hertford, Esquire, deceased, by his last will and testament in writing, bearing date the 19th of December, 1816, gave and devised to his son, the Reverend Thomas Snell, late of Windlesham, in the county of Surrey, clerk (now deceased), certain estates and properties therein particularly mentioned or referred to; and also all the residue of his lands and hereditaments not otherwise disposed of in and by his said will, comprising (amongst others) a messuage or tenement, garden, stable, and premises, with the appurtenances thereto belonging, situate near and adjoining to the King's Head public-house and premises at Chingford Green, in the parish of Chingford, in the county of Essex, lately sold or contracted and agreed to be sold to Jeremiah Humphreys, of Chingford aforesaid, farmer: and it was in and by the said will of the said William Snell provided, that, if it should appear that any of the estates and premises by that his will given and

devised to or in trust for any person or persons other than and except his said son Thomas Snell, should be entailed or subject to any limitation over which he the said testator had not any control, and which should operate to lessen or abridge the devise thereinbefore made, then the person or persons to or for whose use or benefit such estate or premises so entailed or limited should by that his will be devised, or be mentioned or intended to be devised, should have and be entitled to an equivalent in other estates and premises from and out of the estates and premises to which his said son Thomas Snell would become entitled
*40] under or by virtue of *that his will: and he directed that such equivalent should be made and effected by his said son Thomas Snell, his heirs and assigns, accordingly: Now, I, John Mears, of Bagshot, in the county of Surrey, gentleman, sole acting trustee of the will of the said Thomas Snell, deceased, do solemnly and sincerely declare, that, to the best of my knowledge, information, and belief, no claim has ever been made against the said Thomas Snell or his estates under or by virtue of the before-mentioned provision contained in the will of the said William Snell, deceased: *and I further declare, that, to the best of my knowledge, information, and belief, no land-tax has ever been paid for or in respect of the before-mentioned close of land and premises subsequently to the purchase or redemption thereof in or about the year* 1799: And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provision of an act of parliament, &c. (5 & 6 W. 4, c. 62).

(Signed) "JOHN MEARS.

"Declared at the Marlborough Street police court, this 11th day of October, 1844, before me. E. H. MALTBY, Magistrate, Metropolitan Police District."

On the 31st of October, 1856, the solicitors of Richard Poppleton sent to the solicitor of Andrew Buchanan a letter of the material part of which the following is a copy:—

"Without waiving any of the objections and requisitions heretofore made by us, we beg to say that we are willing, on behalf of Mr. Poppleton, to receive within seven days from this date such further abstract of title as you may think proper to deliver relating to the freehold portion of the Lot 1; but we must beg that it may be in the usual and proper form of an abstract. We have not asked specially for the will of Thomas Snell, because it ought to form part of the abstract of the
*41] earlier title which we have required. The abstract we *desire to have, is, one of the usual character, and one which ought properly to contain the will of the said Thomas Snell. The propriety of our requesting a proper abstract of the will of William Snell is evidenced by what is disclosed upon the declaration of Mr. Mears, of which you have sent us a copy. We think you are mistaken in saying that we had previously seen the declaration. We certainly never read it before. An important question may arise upon the provisions of the will, respecting which we should have been left in perfect ignorance had we been satisfied with the very short statement furnished to us. We should be informed when John Snell, the lunatic, mentioned in the lease, died, and who was his heir-at-law. In the abstract of the counterpart lease which you have supplied to us, there is, we must repeat, considerable confusion: William Snell is described as 'committee of the estate of his

brother John Snell, of Brill, a lunatic, and the eldest son and heir-at-law of the said John Snell.' According to this statement, William Snell is the brother and also the son of the same John Snell: surely this needs explanation and further information. The further abstract should state when William Snell died, and where his will was proved.

"16. The property comprised in the certificate of the redemption of land-tax now abstracted, cannot be held to include the freehold portion of the lot, because, as far as appears upon the documents furnished to us, Charles Smith, who made the contract for redemption, never was entitled to the freehold, and therefore could not redeem; and, as time is no bar to the Crown, the vendor must now redeem the tax. We cannot find any recital or statement in the deed of 1844, that the property is free of land-tax; but only that money is paid for the purchase of the property free of land-tax.

*"We must repeat our former notice to you, that, if you either now decline to make a sufficient title to the freehold portion of the property, or fail to do so within the space of one week from the date of this letter, we shall commence an action for the recovery of the deposit." [*42

The solicitor of Andrew Buchanan, on the same day, sent to Richard Poppleton's solicitors a letter accompanied with an abstract of the will of William Snell, of which abstract and letter, so far as is material, the following are copies:—

"As you now request it, I beg to send you an abstract of the will of William Snell, but without at all admitting that you have a right to it, or in fact anything more than the abstract originally sent to you: and I must distinctly beg you to understand that I do not waive any of our rights under the conditions of sale, and that what I have sent you beside the abstract has been done solely with a view of avoiding litigation. I do not know when John Snell died; and we allege that his brother William was his heir-at-law. In the abstract lease, it is a mere clerical error calling William Snell the son of John, instead of the brother, as you could have seen by comparing the abstract, if you had chosen. We do not know when William Snell died, or where his will was proved.

"16. The statement in the deed of 1844, and Mears's declaration, is sufficient. I have now answered everything that you have asked; but I must beg you again to distinctly understand that I have nothing more in the shape of abstract, and shall furnish nothing more, unless at your expense; and whatever you may require that is not in our possession or knowledge, I will at your request endeavour to obtain, at your expense; and I contend that we have furnished you with a perfectly good title to the freehold; and, as it is quite clear that *your client is a most unwilling purchaser, I must request, that, if you are still dissatisfied, you will at once commence your action to recover the deposit, as there is another party who is willing to purchase: and if in three days I do not hear from you, I shall treat with him for it at your risk." [*43

"Abstract of will of William Snell, Esquire, deceased.

"1816. December 19th. William Snell, late of Salisbury Hall, in the parish of Shenley, in the county of Hertford, Esquire, deceased, by his last will and testament in writing, of this date, gave and devised to his son, the Reverend Thomas Snell, late of Windlesham, in the county of Surrey, clerk, now deceased, certain estates and properties therein

particularly mentioned or referred to; and also the residue of his lands and hereditaments not otherwise disposed of in and by his said will, comprising (amongst other things) a messuage or tenement, garden, stable, and premises, with the appurtenances thereto belonging, situate near and adjoining to the King's Head public-house and premises at Chingford Green, in the parish of Chingford, in the county of Essex: Proviso, that, if it should appear that any of the estates and premises by that his will given and devised to or in trust for any person or persons other than and except his said son Thomas Snell, should be entitled or subject to any limitation over which said testator had not any control, and which should operate to lessen or abridge the devise thereinbefore made, then the person or persons to or for whose use or benefit such estate or premises so entailed or limited should by that his will be devised, or be mentioned or intended to be devised, should have and be entitled to an equivalent in other estates and premises from and out of the estates and premises to which his said son Thomas Snell would become entitled under or by virtue of that his will. Direction that such
*44] equivalent should be *made and effected by his said son Thomas Snell, his heirs or assigns, accordingly."

To this the solicitors of Richard Poppleton sent the following reply:

"1856. November 6th.

"Having regard to the statement in your letter of the 31st of October, that you have nothing more in the shape of abstract, and that you will furnish nothing more unless at our expense, as well as your announcement that you are about immediately to treat with a new purchaser, we think it unnecessary to say more, with reference to our former objections, than that we still maintain that you have not furnished proper evidence to us of the redemption of the land-tax, and that your abstract of title (previous to 1844) to the freehold is still quite incomplete. You have not furnished an abstract in chief of the will of Thomas Snell, though we have twice referred to its necessity. You profess your ignorance of the date of William Snell's death. You are unable to state when or where his will was proved: it does not appear that it was properly attested; nor do you give us any means of ascertaining these facts. The second abstract which you have now furnished of that document, not only shows the liability of the estate you have contracted to sell to answer claims which may still be subsisting under that will (forming a serious additional objection), but also appears on the face of it to be altogether imperfect, as it does not even show what the devises are which the estate now purchased is liable to make good. There is no attempt made to deduce the title of William Snell as heir-at-law of John Snell, by pedigree or otherwise; and no kind of evidence that William Snell was seised of the property previously to 1816, with which year in fact the earlier abstract commences. Under these circumstances, we
*45] propose to accede to your request of at *once commencing an action for the deposit, if we do not hear anything from you to-morrow to prevent our doing so; reminding you that we have hitherto been prevented from taking that course by your continuing from time to time to furnish us with small portions of that which we have demanded, at the same time that you protested against our right to require the information. Had you stood upon the right you claimed, viz., to commence the

abstract in the year 1844, our correspondence would have been much more limited. To prove to you, however, that we have no desire but for a cheap and expeditious settlement, we now offer to lay the correspondence and abstracts before any of the conveyancing counsel of the Court of Chancery whom you may select, leaving him to decide,—first, whether you have shown such a title as under the conditions we are bound to accept,—and secondly, if not, whether we have a right to recover back the deposit, with costs, and interest on the deposit from any and what date,—the costs attending the case to follow the result. Requesting your reply to this latter proposal in the course of to-morrow, we remain, &c."

In consequence of a difference as to the questions to be thus submitted, this suggestion was not carried out; and, after a correspondence which is unimportant, Richard Poppleton's solicitors demanded a return of the deposit, and, on the 27th of November, 1856, brought an action against Mr. Debenham, the auctioneer, for the recovery of it. And Andrew Buchanan's solicitor, in December, 1856, proceeded to sell the Lot 1 over again, and by private contract; upon which sale it realized 2340*l.*, including the fixtures, which were not included in Richard Poppleton's purchase,—the price thereof being 120*l.*: and certain expenses were incurred on such resale, which it was agreed should be ascertained, if necessary, by the master.

*To this resale no objection had been made on the part of Richard Poppleton. [*46

An interpleader summons having been taken out and served by Mr. Debenham's attorney, Richard Poppleton, Andrew Buchanan, and the auctioneer, attended before Crowder, J., upon that summons; and that learned judge directed that the sum of 500*l.*, the deposit, less 3*l.* 8*s.*, his costs, should be paid into court by Mr. Debenham: and a writ having been since issued by Richard Poppleton against Andrew Buchanan, and another writ having been issued by Andrew Buchanan against Richard Poppleton, by the consent of the parties, by an order of Crowder, J., it was ordered that the above-mentioned actions should be consolidated, and that this case should be stated for the opinion of this court, with power to the court to decide the rights of the parties in law and in equity.

Andrew Buchanan insists that he is entitled to the deposit of 500*l.*, and also to his costs incurred in respect to his sale to Richard Poppleton, and the expenses incident to the investigation of title thereunder, and also the deficiency in price realized upon the resale, and the expenses thereof. And Richard Poppleton insists that he is entitled to the deposit, and to recover interest thereon, and his costs of investigating the title.

It was agreed that the said costs and expenses, in either of the said cases, should be ascertained by the master, and that the questions for the opinion of the court should be,—

1. Whether the said Andrew Buchanan has shown such a title to the freehold part of the said lot as by the said conditions of sale he undertook to show.

2. Whether the said Andrew Buchanan has shown such a title to the freehold part of the said lot as by the conditions of sale the purchaser was bound to accept.

*47] *The court were to have power to declare the rights and liabilities of the parties resulting from their opinion upon the above two questions, and to declare and direct to whom the said deposit, or any and what part thereof, should be paid, and for whom and for what sum judgment should be entered in the said actions respectively.

The case was argued in Michaelmas Term last, before Cockburn, C. J., Williams, J., Crowder, J., and Willes, J.

Byles, Serjt. (with whom was *Hannen*), for the plaintiff, the purchaser.(*a*)—But for the 7th condition, the vendor would still be bound to show a sixty years' title, notwithstanding the statute 3 & 4 W. 4, c. 27: Cooper *v.* Emery, 1 Phill. 388; Sugden's Vendor & Purchaser, 13th edit. 305; Blackburn *v.* Smith, 2 Exch. 783.† That condition provides that "every deed and entry on or copy of court-roll dated more than

*48] ten years ago, shall *be conclusive evidence of everything recited or stated therein." The recital in the deed of the 18th of October, 1844, that Thomas Snell was, at the time of making his will, and at his death, seised in fee-simple of, or otherwise well and sufficiently entitled to, the land in question, does not meet the difficulty. It is consistent with that statement that he was seised in fee of a reversion which may fall into possession after a term of a thousand years, or seised for life. It is not even alleged that he is seised in fee beneficially: he may be seised in fee as a trustee or mortgagee. Or he may have been seised in fee subject to a condition subsequent which might defeat his estate: and this, as it now appears, was his actual condition. In Goold *v.* White, Kay 683, copyholds having been sold subject to a condition, that all statements and recitals in any of the title-deeds or muniments of title should be considered as satisfactory evidence of the facts stated or recited, and that, in case any purchaser should not, within fourteen days from the delivery of the abstract, declare his dissatisfaction with the title, and point out some valid objection thereto, the same should be considered as accepted,—the purchaser objected that the first surrender on the abstract was by A. and J. his wife, "which said J.," it was therein stated, "had then lately been admitted there tenant in tail according to the custom of that manor;" and that there was nothing to show how the estate-tail had been barred: afterwards, the purchaser required evidence that the custom of the manor warranted estates-tail: the first surrender was dated in 1801, and was conditional only: in 1815, the same parties made an absolute surrender in fee, under which the possession had been enjoyed ever since: and it was held, that the recital was conclusive evidence, under the conditions of sale, of *the fact*

(*a*) The following were the points marked for argument on the part of the plaintiff in the first action:—

"1. That the vendor was bound to furnish and verify to the vendee a proper abstract showing a marketable title, and that he has not done so; and that there is nothing in the conditions of sale to exempt the vendor from this obligation:

"2. That the vendor was bound to show a good title going back sixty years; and that he has not done so:

"3. That, if it were intended by the vendor to limit by the conditions of the sale the ordinary rights of a vendee with respect to the title, such intention ought to have been expressed in clear and unambiguous language; but that neither the 7th nor 8th condition, or any other, does so express such intention:

"4. That the abstract, or pretended abstract, of title to the freehold furnished by the vendor, is defective in the several points particularized in the correspondence set forth in the case:

"5. That no title to the land-tax is shown by the vendor."

that J. had been admitted tenant in *tail, but not that this was according to the custom of the manor; for, this was not a *single fact*, but *a deduction from a series of facts*. [CROWDER, J.—There, the condition provided that the recitals should be evidence of the *facts* recited: here, they are to be conclusive evidence of *everything* recited.] The word is undoubtedly larger here. But parties are never bound by mis-recitals as to matters of law. The rule for the construction of these conditions is well laid down by Sir L. Shadwell, V. C., in Symons *v.* James, 1 Y. & C., C. C. 487, 490,†—"If a vendor means to exclude a purchaser from that which is matter of common right, he is bound to express himself in terms the most clear and unambiguous. And, if there be any chance of reasonable doubt or reasonable apprehension of his meaning, I think that the construction must be that which is rather favourable to the purchaser than to the vendor." But, assuming that the plaintiff (the purchaser) is by the terms of the 7th condition shut out from requiring a sixty years' title,—assuming that he has agreed not to object to the title on the ground that it does not go back so far,—still he clearly is entitled to a sixty years' abstract, in order that he may see what the title is. [COCKBURN, C. J.—What is the use of an abstract, if you are precluded from objecting to the title?] The purchaser's agreeing to take such a title as the vendor has, does not dispense with the latter's showing what that title is. [CROWDER, J.—Does not the 14th condition show that the abstract is to be confined to the title which the purchaser is bound to accept?] Clearly not. Sugden says—Vendor & Purch., 13th edit. 355,—that "a man may be entitled to an abstract of the title, and yet be compelled to accept the title itself as it stands;" for which he cites Morris *v.* Kearsley, 2 Y. & C. Exch. 139.† [WILLES, J.—The learned author notices that case as an exception.] In Southby *v.* Hutt, 2 Mylne & Cr. 207, by *conditions of sale it was stipulated that the vendor of an estate which was sold in lots should deliver an abstract of the title to the purchasers, and deduce a good title; but that, as to a part of the estate, acquired under an enclosure, he should not be bound to show any title thereto prior to the award; and it was further stipulated that the vendor should deliver up to the largest purchaser in value all the title-deeds and other documents in his custody, but should not be required to produce any original deed or other documents than those in his possession and set forth in the abstract: and it was held, on the construction of these conditions, that they did not relieve the vendor from his liability to verify the title shown upon the abstract by producing the title-deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence. In Dart's Vendor & Purchaser, p. 48 (3d edit. 68), it is said: "Particulars and conditions of sale, if intended to exclude the purchaser from what he would otherwise be entitled to, must be expressed in terms the most clear and unambiguous; if there be any chance of reasonable doubt or misapprehension as to their meaning, the construction will be in his favour." For this the learned author cites, amongst other cases, Seaton *v.* Mapp, 2 Coll. C. C. 562, where Sir L. Shadwell, V. C., says,—"I do not greatly admire the case on either side: but I think, and have always thought, that, when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incum-

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bent on the vendor to express himself with reasonable clearness: if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself." The correspondence will probably be *51] relied on as *supplying all defects. This, however, it clearly does not. As to the lease by William Snell, the recitals therein do not amount to an admission of title in him; for, the deed itself shows that he had no title. A link is wanting to show that he took as heir-at-law of John Snell, the lunatic. Then, as to the will of 1816, it is not shown that it was duly attested, or that it ever was proved. Then, there is no abstract in chief of Thomas Snell's will, but only a recital of it in the indenture of October, 1844. The property is sold as "land-tax redeemed." The statutory provision for the redemption of land-tax, is contained in the 42 G. 3, c. 116, s. 38. Now, the only evidence of such redemption, is, the statement in the conveyance of the 18th of October, 1844, from Mears to Humphreys, that the consideration-money paid by Humphreys was "in full for the absolute purchase of the premises, and the fee-simple and inheritance thereof in possession, *free from land-tax, and all other encumbrances.*" There is no statement of the fact of the land-tax having been redeemed at all. In Sugden's Concise View, p. 274, it is said, that, "to land-tax, if sold separately, or where the estate is sold as discharged from it, a title must be shown under the land-tax redemption act," 42 G. 3, c. 116. The 7th condition, therefore, cannot help this defect. Mears's declaration, made in 1844,—that, "to the best of his knowledge, information, and belief, no land-tax had ever been paid for or in respect of the before-mentioned close of land and premises subsequently to the purchase *or* redemption thereof in or about the year 1799,"—carries the case no further. It is not a positive allegation that the land-tax was redeemed; and the declarant speaks only upon information and belief.

Hugh Hill, Q. C. (with whom was *Dowdeswell*), for the defendant, the vendor.—The main question is, *whether the defendant has *52] shown such a title to the freehold portion of Lot 1 as he contracted to show. The rule in equity, upon this subject, is different from that at law. A court of law will not consider whether the title is such as a court of equity would compel an unwilling purchaser to take, but simply whether the vendor has or has not a legal title to convey: Boyman *v.* Gutch, 7 Bingh. 379 (E. C. L. R. vol. 20), 5 M. & P. 222. The case of Blackburn *v.* Smith, 2 Exch. 783,† is an authority to show that an abstract for sixty years need not be produced. By the 7th condition, it is provided that every deed and entry on or copy of court-roll dated more than ten years ago, shall be conclusive evidence of everything recited or stated therein. Corrall *v.* Cattell, 4 M. & W. 734,† affords a strong illustration of the extent to which a court of law will go in giving effect to the plain meaning of the conditions. The recital, therefore, in the deed of the 18th of October, 1844, that Thomas Snell, the testator, was seised in fee, must be taken to be conclusive evidence of that fact. Further, there is in the extract from the conveyance by Humphreys, of the 24th of May, 1845, a statement of the legal effect of the former deed, which fairly comes within the meaning of the 7th condition. There is no case in which a court of law has ever held a sixty years' title necessary since the 3 & 4 W. 4, c. 27. There is ample

evidence in the recital in the deed of 1844, and in the declaration of Mears, that the land-tax has been redeemed.

Byles, Serjt., in reply, referred to Shepherd *v.* Keatley, 1 C. M. & R. 117,† Sellick *v.* Trevor, 11 M. & W. 722, 728,† and Jeakes *v.* White, 6 Exch. 873.† Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

These are cross-actions between the vendor and *purchaser of an [*53
estate in Essex. The vendor claims against the purchaser, as forfeited, the deposit of 500*l.* (which, with the exception of 8*l.* 8*s.* deducted under an interpleader order, is now in court), the costs incurred with respect to the sale, the expenses incident to the investigation of the title, the deficiency in the price realized upon a resale of the property in consequence of the refusal of the purchaser to complete, and the expenses of such resale. The purchaser, on the other hand, claims the deposit and interest, and the costs of investigating the title. These are the claims stated in the special case, and upon which we are to decide.

No question of specific performance can arise, the property having been resold, and the vendor having chosen to bring an action. The substantial question is, whether the vendor has shown a sufficient title.

Upon the argument before my Lord Chief Justice, my Brothers Williams and Crowder, and myself, much discussion took place upon the construction of the conditions of sale, and the sufficiency of the title shown, with reference to those conditions. Amongst other objections on the part of the purchaser, it was urged that, by the contract, the land was described as land-tax redeemed, and that no sufficient proof was given by the vendor, that, in respect of the freehold part of the property, the land-tax had been redeemed. This, in the absence of a special condition of sale, would be a well-founded objection. The vendor was bound to give reasonable evidence that the land-tax had been redeemed, or that, if purchased, it was in his power to transfer or release it; and, ordinarily, the proper evidence of this would be the certificate of the commissioners or a copy of the register. A statement in the deed of 1844, to which the purchaser was no party, would not be sufficient, of itself; and the statutory declaration of Mears twelve years before the purchase, that, to the best of *his knowledge and belief, [*54
no land-tax had ever been paid for or in respect of the land "subsequently to the purchase *or* redemption thereof in or about the year 1799," leaves it doubtful whether the land-tax ever was redeemed so far as to free the land from liability either to the Crown or to a purchaser under the statute 38 G. 3, c. 60, or his representatives.

The vendor, however, relies upon the seventh condition of sale, by which it is provided that "every deed and entry on or copy of court-roll dated more than ten years ago, shall be conclusive evidence of everything recited or stated therein:" and he insists that, by force of that condition, the statement in the conveyance of the 18th of October, 1844, from John Mears to Jeremiah Humphreys, from whom the property came by various mesne assignments to the defendant, is sufficient, and indeed conclusive evidence that the land-tax was redeemed. That statement occurs in the witnessing part of the deed, and is as follows:—"It is witnessed, &c., and in consideration of the sum of 290*l.*, &c., to the said John Mears, &c., paid by the said Jeremiah Humphreys, &c., the receipt of which the said John Mears acknowledged, and that the same

was in full for the absolute purchase" of the premises, "and the fee-simple and inheritance thereof in possession, free from land-tax and all other encumbrances."

The purchaser insists that this is not a statement of the fact that the land-tax had been redeemed, but only an acknowledgment by the then vendor that the then purchaser had paid 290*l.* for the land as being free of land-tax and other encumbrances; and that it is consistent with such statement that the land-tax had not been redeemed, or at least that it had been purchased and assigned to the then purchaser, or a trustee for him, in whom or in whose representatives it may now be vested.

*55] *We are of opinion that the purchaser is right in this contention. The statement, to bind him conclusively under the seventh condition, ought to be something alleged by way of direct recital or similar statement in the deed, and not merely matter to be inferred as the probable, not certain, result of what is stated. Nor can this be considered as other than a substantial objection; for, upon the special case as it stands, there are no materials for forming a judgment whether or not the estate is free from the tax.

For these reasons, we are opinion that the vendor has failed to make out such a title to the freehold as by the conditions of sale he undertook to show, or as a purchaser was bound to accept. No question of whether the objection is not mere matter of compensation,—which probably it is,—arises in the present proceeding; there being, as we have stated, and for the reasons we have stated, no claim made or sustainable for specific performance: and, although we are, by consent, to consider the rights of the parties both at law and in equity, that must mean existing rights with reference to the remedies applicable to them.

With regard to the amount to be recovered by the purchaser, it is not affected by the 14th condition of sale; for, the vendor insisted throughout upon his being in the right, and did not give notice under that condition to annul the sale.

We therefore give judgment in Buchanan *v.* Poppleton for the defendant: and in Poppleton *v.* Buchanan, we give judgment for the plaintiff for the sum of 3*l.* 8*s.*, deducted on paying the deposit into court, the interest upon the deposit to this time, and the costs of investigating the title, to be ascertained by the master: and we direct that the sum deposited in court be paid out to the plaintiff in that action.

Judgment accordingly.

The rules which govern the rights and liabilities of the parties to an executory contract of sale of real estate, are substantially the same in the United States as in England, though in practice there may be differences in their application. Thus it seems to be now universally held, that a vendee is entitled to require a good title, clear of all encumbrances, or, if the latter exist, to have them discharged out of the purchase-money, even though the contract of sale contain no agreement for covenants of warranty: Bates *v.* Delavan, 5 Paige 300; Winne *v.* Reynolds, 6 Id. 407; Westervelt *v.* Matheson, Hoffm. Ch. 37; Fletcher *v.* Butler, 4 Comst. 396; Burwell *v.* Jackson, 5 Seldon 536; Ludwick *v.* Huntziger, 5 Watts & Ser. 59; Creigh *v.* Shatto, 9 Id. 83; Dalzell *v.* Crawford, 1 Pars. Eq. 37; Garnett *v.* Macon, 2 Brock. 186; Morgan *v.* Morgan, 2 Wheat. 290; Smith *v.* Pettus, 1 Stew. & Port. 107;

Prothro *v.* Smith, 6 Rich. Eq. 336; Owings *v.* Baldwin, 8 Gill 337; Kent *v.* Allen, 24 Missouri 98. And it is necessary, further, at least for the purposes of a bill for specific performance, that the title shall be a marketable one, free from reasonable doubt in matter of law or in fact, or, as it has been sometimes expressed, such as a prudent person would not hesitate to purchase for a full price: For, as the court cannot warrant the title, it ought not to force on a purchaser, that which he may be unable to defend: Creigh *v.* Shatto, 9 Watts & Ser. 83; Gans *v.* Renshaw, 2 Barr 35; Garnett *v.* Macon, 2 Brock. 244; Seymour *v.* Delancey, Hopk. 436; Brown *v.* Cannon, 5 Gilm. 174; Lewis *v.* Hernden, 3 Litt. 358; Jones *v.* Taylor, 7 Texas 246; Sohier *v.* Williams, 1 Curtis C. C. 491; Dalzell *v.* Crawford, 1 Pars. Eq. 57. The mere doubtfulness of a title, however, is not in general admitted in an action at law, as a defence to the purchaser's liability on the contract, except where it turns on a disputed question of fact, for as to a question of law, the court has the power to reduce it to a certainty by its decision: Kent *v.* Allen, 24 Missouri 106; though this is a point on which there has been some diversity of opinion in England: see 2 Sugden, Vend. 201. And it is not every doubt on which even a court of equity will act; it must be a reasonable and well grounded one. It is not enough to show that the title may possibly be defeated: Seymour *v.* Delancey, Hopkins 436; S. C. 5 Cowen 714; Thompson *v.* Dallas, 5 Rich. Eq. 370; Dalzell *v.* Crawford, 1 Pars. Eq. 57. Even the existence of an actual adverse claim, upon which suit has been brought against the vendor, will not be sufficient, if the court is satisfied that it cannot be maintained: Owings *v.* Baldwin, 8 Gill 355.

With regard to encumbrances, moreover, the rule is less stringent. A pecuniary charge against a good title constitutes no objection, where the charge can be removed or paid off out of the purchase-money: Tiernan *v.* Roland, 15 Penn. St. 429; Greenly *v.* Cheeves, 9 Johns. 127; Soper *v.* Kipp, 1 Halst. Ch. 388; Moore *v.* Shelley, 2 Watts 217; or where it is of a trifling character or such that adequate security can be given against, or compensation decreed: Winne *v.* Reynolds, 6 Paige 407; Thompson *v.* Carpenter, 4 Penn. St. 134; Guynet *v.* Mantel, 4 Duer 95; see Tiernan *v.* Roland, 15 Penn. St. 441. So where the purchaser has knowledge of the encumbrance before entering into the agreement: Ten Broeck *v.* Livingston, 1 Johns. Ch. 357; Winne *v.* Reynolds, 6 Paige 414; Guynet *v.* Mantel, 4 Duer 95. And in general the objection in respect to encumbrances, must be made at the time of the tender of the deed: M'Whorter *v.* M'Mahan, 10 Paige 386. But where the charge cannot be removed, and particularly where it is of a character to affect the estate itself, the purchaser will not be compelled to take. Thus an irredeemable ground-rent in Pennsylvania constitutes such an objection, and is not the subject of compensation: Gans *v.* Renshaw, 2 Penn. St. 37; see Allen *v.* Gault, 27 Id. 478. So of pre-emptive rights, and fines on alienation, under the manorial tenures in New York, Winne *v.* Reynolds, 6 Paige 414; and of a contingent charge which is the subject of litigation, Garnett *v.* Macon, 2 Brock. 186; and of mortgages and other liens, which are not payable till after the purchase-money falls due: Moore *v.* Shelley, 2 Watts 257; Judson *v.* Wass, 11 Johns. 525; though see Guynet *v.* Mantel, 4 Duer 95. And where the amount of the charges exceeds the unpaid purchase-money, the purchaser will of course be relieved: Garrett *v.* Crossen, 32 Penn. St. 375.

That the title of the vendor was de-

fective at the time of the execution of the agreement, or even of the commencement of suit, will not be material, if he can make a good title clear of encumbrance before the decree, unless where time is or has become of the essence of the contract, or the defendant has been materially injured by the delay. It is, otherwise, merely a question of costs: Dutch Church *v.* Mott, 7 Paige 97; Creigh *v.* Shatto, 9 Watts & Serg. 83; Garnett *v.* Macon, 2 Brock. 246; Hepburn *v.* Auld, 5 Cranch 262; Hepburn *v.* Dunlap, 1 Wheat. 179; Soper *v.* Kepps, 1 Halst. Ch. 388; Jarboe *v.* M'Atee, 7 B. Monr. 283.

In the establishment of a vendor's title, it is usually considered that the purchaser must be satisfied with primâ facie, and that often very slight evidence of those facts which are necessary to connect the links of the paper title, and as to which no reasonable doubt is suggested. For this purpose, recitals in deeds are frequently relied on. Such recitals, however, where the deed is recent, or no corresponding possession has been proved, are evidence only as against parties and privies; and are inadmissible against strangers and persons claiming under an adverse title, or one derived from the same source but anterior to the reciting deed: Penrose *v.* Griffith, 4 Binn. 231; Weidman *v.* Kohr, 4 Serg. & R. 174; West *v.* Pine, 4 Wash. C. C. 691; Carver *v.* Jackson, 4 Peters 88; Crane *v.* Morris, 6 Id. 598; Jackson *v.* Roberts, 11 Wend. 433; Smith *v.* Webster, 2 Watts 478; Wallace *v.* Miner, 6 Hamm. 370; Wiley *v.* Givens, 6 Gratt. 277; Hite *v.* Shrader, 3 Litt. 444; Little *v.* Palister, 4 Greenl. 212; Sims *v.* Meacham, 2 Bail. 101; Edwards *v.* Bullard, 14 B. Monr. 290; Hoyatt *v.* Phiter, 4 Dev. 273. In such a case, therefore, a mere recital will not be admissible in evidence, in a suit to compel specific performance by a purchaser: Smith *v.* Webster, 2 Watts 478. But where the recital is contained in an ancient deed, and the possession has accompanied and been in accordance with the deed, it will be primâ facie evidence, not only of pedigree and other matters in pais, but of deeds and other written documents, even against strangers: Little *v.* Palister, 4 Greenl. R. 209; Fuller *v.* Taston, Spencer 65; Maverick *v.* Austen, 1 Bailey 61; Jarboe *v.* McAtee, 7 B. Monr. 281: Doe *v.* Phelps, 9 Johns. 169; Doe *v.* Campbell, 10 Id. 475; Jackson *v.* Russel, 4 Wend. 543; Stokes *v.* Dawes, 4 Mason 268; Paxton *v.* Price, 1 Yeates 500; James *v.* Letzler, 8 Watts. & Serg. 192; Pryor *v.* Wood, 31 Penn. St. 142. And even where the character of the possession is ambiguous, but not contrary to the fact recited, the recital will be at least secondary evidence of a lost deed: Garwood *v.* Dennis, 4 Binn. 314.

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*56] *REES, Appellant, DAVIES, Respondent. *Feb.* 11.

Upon an application (under the 1 & 2 Vict. c. 74) by a landlord to justices in petty sessions, to recover possession of premises held over by his tenant after the expiration of the term, the tenancy having been proved to the satisfaction of the justices, and its legal determination, and the tenant's refusal to quit,—Held, that the jurisdiction of the justices to give the landlord possession, was not ousted by the tenant's setting up the title of third person.

THIS was a case stated for the opinion of the court, pursuant to the statute 20 & 21 Vict. c. 43.

At a petty sessions holden in and for the hundred of Swansea, in the county of Glamorgan, on the 19th of December, 1857, before, &c., Lewis Rees, the appellant, was charged in and by a certain complaint,—for

that he the said Lewis Rees unlawfully held over and detained from the above-named respondent, James Davies, a certain tenement consisting of a *house and land*, situate at Rhyd-y-Pollon, in the borough of Loughor, within the said hundred of Swansea, in the said county, held by the said Lewis Rees, under a yearly tenancy, at the rent of 4*l.* per annum, and after the said tenancy had been duly determined by a notice to quit, contrary to the provisions of the statute 1 & 2 Vict. c. 74, and, the said parties respectively being then present, the said complaint was duly heard by us; and upon such hearing we adjudged that a warrant should issue to take and give possession of the said tenement to the said James Davies, the respondent, within the time prescribed by the last-mentioned statute.

Lewis Rees being dissatisfied with the determination of the said justices, as being erroneous in point of law, gave them notice, pursuant to the statute, requiring them to state a case setting forth the facts and grounds of their determination, for the opinion of this court. A case was thereupon stated, as follows:—

At the hearing of the complaint, it was proved on the part of the respondent, James Davies, that notice to quit the said tenements, and also of the respondent's intention to apply to the justices in petty sessions *assembled, to issue their warrant to recover possession thereof, had been duly served on the appellant Rees; and the following evidence was adduced on behalf of both parties: [*57

James Davies. "In the year 1853, I let a tenement, consisting of *a house and garden*, for a year, to commence on the 29th of September, in that year, at the rent of 4*l.*, payable half-yearly. *The defendant paid me the rent from the 29th of September*, 1854, *to September*, 1855, *half-yearly*. He still retains the said premises. The signatures to the notices now produced, marked A. and B., are in my handwriting. The tenement is situate in the borough of Loughor, and called Rhyd-y-Pollon."

Cross-examined. "I became tenant for the mill and all the lands belonging to it, together with the cottages, to Mr. C. H. Smith, from the 29th of September, 1853. I did not go under rent until September, 1854, because we were repairing the mill; and for that year Lewis Rees paid the rent to Mr. Smith. In the month of March (the 12th), I told Lewis Rees that he must pay his rent to me, and he agreed to it. *I then told him he should have a little piece of land* (*about* 10 *perches*) *into the bargain. He paid me the half-year's rent due March*, 1855."

Lewis Rees. "I am the defendant in this case. I reside at Rhyd-y-Pollon, in the borough of Loughor, and have lived there for sixteen years to last Michaelmas. My brother lived there before I went there; and I recollect my grandfather and grandmother living there. I am fifty-five years of age. I was brought up a child there. I recollect my grandfather and grandmother being there fifty years ago. My grandfather had only one son, named Evan Rees, who is my father, and is still alive. My grandfather died about thirty years ago, and my grandmother about sixteen years ago.

"I went into possession of Rhyd-y-Pollon about half *a year after my grandmother died, with the permission of my father. *I* [*58 *took the little field* of Mr. Williams, Mr. Smith's agent, after Mr. Smith came into the property, *at 4l. a year, payable half-yearly*. I paid him

1*l.* 15*s.* for the first half-year. My wife, I believe, paid him the second half-year, 1*l.* 16*s.* *He claimed payment of rent for the house; and I said I would never pay him any rent for the house, as it never belonged to Mr. Smith.* The notice now produced, marked C., was left with my wife, and she gave it to me. *James Davies came to me and demanded the rent for the field and house. I told him I would pay him for the field, but not for the house.* This was the first time James Davies applied to me for the rent. I took the receipts from James Davies as now produced. *I would not have taken them, had he mentioned the house and land in the receipts.* On the 30th of September last, James Davies applied to me for the rent; and I said I had not got it then, but he should have it on the following morning. We afterwards met at Tavern-y-Trap public-house the same day. Thomas Thomas was present. I took him with me to see that I got a right receipt. *James Davies wrote out a receipt for rent for a house and garden. I put the money on the table, and told him I would not take that receipt, and requested him to give me one in the same form as I had received before.* The field I took of Mr. Williams was about three-quarters of an acre. I paid so much for it, because it was convenient. Morgan Jones occupied part of the premises, and Samuel Rosser the rest, when I occupied Rhyd-y-Pollon. Neither Samuel Rosser nor Morgan Jones, or any other person, ever asked me for any rent; and those two gentlemen hold now the same premises as Mr. James Davies does. I never sent my brother-in-law, John Richards, with any message from me to James Davies."

*59] By the magistrates. "James Davies put up the last *fence to the field, my fence having fallen down. I manured the land about eight years ago. James Davies put up the fence after Mr. Smith purchased the property. I used to pay poor-rate for the house; but James Davies pays it now. He stopped me from paying it. Davies enclosed the field before I paid rent to Mr. Williams, Mr. Smith's agent. I gave up the field to James Davies on the 30th of September last. I turned out of it at Michaelmas Day. I have not concerned myself about it ever since. I did not pay any rent to any person whatever, before I paid the first half-year to Mr. Smith's agent. I have searched for all the receipts; but could not find more than those produced. I had possession of the field from Michaelmas, 1853, to Michaelmas, 1854; but I did nothing with it. I am not aware that any other person used it. James Davies pulled down the fence that was there, and re-fenced it before I paid any rent to Mr. Williams. The field was re-fenced by Davies about the first of the summer of 1854. I paid the rent of the field for that year, although I did not use it, because I thought it would be a convenience to me thereafter. James Davies did not use it that year. I have not measured it. To the best of my knowledge, the field is half an acre. I am sure it is forty perches."

Mary Rees, the wife of Lewis Rees. "I have lived in Rhyd-y-Pollon for sixteen years with my husband. I never saw Mr. Smith, who is now present, until about three weeks ago, when I saw him in this court. I never had any conversation with James Davies as to renting Rhyd-y-Pollon. I recollect Samuel Rosser and Morgan Jones holding the premises now held by Davies. I remember Williams holding the mill. I never heard either of those persons demand rent for Rhyd-y-Pollon."

By the magistrates. "We used to pay poor-rates 15½*d.* every quarter.

We were rated according to the rent. We never paid rates before Davies came there. I paid *a poor-rate to the landlord of the Cross-Keys, who I think was overseer of the poor. I think it was 15½*d.* [*60 I think this was twelve months or a year and a half ago. Then James Davies took the payment of the poor-rates out of our hands. *The poor-rate was paid for the house.* We had a portion of land before Davies came into possession,—about a quarter of an acre. Davies afterwards gave us another piece, larger. There was a fence between the piece Davies gave us and the piece we held before. Afterwards, Davies made a new hedge round the whole; and we afterwards drew the old fence down. I am certain we paid poor-rates for the house before Davies came into possession."

Morgan Jones. "I occupied Gors-y-flin, near Loughor,—about ten acres of land. I held it under the Duke of Beaufort for thirty-four years. I left it when James Davies took possession. I had notice from James Davies to leave. I remember Lewis Rees's grandfather and grandmother living at Rhyd-y-Pollon; and it has always been with the family up to the time of the possession of Lewis Rees, whose father is now alive. It did not belong to Gors-y-flin. It was formerly a poor-house. The parish did not pay rent to any person. It was built on a common in the possession of the corporation of Loughor. I recollect its being taken in by the corporation."

Cross-examined. "The piece of land at Rhyd-y-Pollon was enclosed from the common about twenty years ago. Twenty years ago, Samuel Rosser occupied seven acres (the lower meadow) of Gors-y-flin, and some waste-lands which Samuel Rosser enclosed, and I believe paid rent for. Samuel Rosser never did pay for the waste-lands. I enclosed part of the waste-lands about thirty years ago. Lewis Rees's family occupied Rhyd-y-Pollon for about thirty years before the new enclosure was made. Rhyd-y-Pollon house was a *poor-house forty years ago. [*61 Lewis Rees's father lived at Rhyd-y-Pollon when it was a poor-house."

Susan Jones. "I am seventy-four years of age. I lived in the house next door to Rhyd-y-Pollon for seventy-two years. I was born there. My first recollection of Rhyd-y-Pollon is, that it was a poor-house. I recollect Lewis Rees's grandfather living at Rhyd-y-Pollon sixty years ago. I remember Mary Bulk living in the poor-house for twenty years; and she died in 1805; and it was after she died that Lewis Rees's grandfather came there to live."

Josiah Williams. "About thirty-six years ago I rented Loughor Mill, and occupied it for thirty-two years. I had nothing to do with Rhyd-y-Pollon. Lewis Rees's family lived there then."

Thomas Thomas. "On the 30th of September last, I was at the Tavern-y-Trap with Lewis Rees and James Davies, when Lewis Rees objected to the form of a receipt made out by James Davies, because it mentioned *the house* and land."

At the hearing it was contended, on the part of the appellant, that no legal tenancy was proved, and that the justices had no jurisdiction in the matter, inasmuch as one Evan Rees claimed to be entitled to the said tenement.

The justices, however, being of opinion that the evidence adduced brought the case within the operation of the statute 1 & 2 Vict. c. 74,

gave judgment against the appellant, and ordered that a warrant should issue to take and give possession of the tenement held over, within twenty-five days from the date of the order,—upon the following ground, viz. that, the tenancy and holding over being proved to their satisfaction, they were not empowered to entertain a claim to the fee of the property, set up on behalf of a third party.

*62] *Griffits*, for the appellant.—There was no evidence of tenancy. [Williams, J.—Surely there was *some* evidence. Byles, J.—The appellant admits that he paid the respondent two half-years' rent.] Not for the house, but for the additional piece of land, the possession of which he derived from the respondent. It sufficiently appears from the whole case that the appellant never did come in under the respondent. But, there being a bonâ fide claim of title in Evan Rees, the justices had no jurisdiction. [Willes, J.—Where is that laid down?] In Burn's Justice, title "Justices of the Peace," § VII., 4, 29th edit. p. 1012, where it is said, that, "as a general rule, where property or title is in question, justices have no jurisdiction to decide upon it;" citing Rex *v.* Burnaby, 3 Salk. 217, 2 Lord Raym. 900; Rex *v.* Speed, 1 Lord Raym. 583; Kinnersley *v.* Orpe, Dougl. 499. Indeed, it would be somewhat singular if the magistrates had such power under the 1 & 2 Vict. c. 74, when it is not vested in the county courts. [Williams, J.—The justices here do not affect to determine any question of title: all they decide, is, that there was a tenancy, that the term was duly put an end to, and that the tenant refused to quit.] The justices could not decide in favour of the respondent without entertaining the question of title.

Josiah Rees, contrà, was stopped by the court.

Williams, J.—I think the justices must be taken to have given credit to the story of the respondent, and to have disbelieved that told by the appellant and his witnesses, and to have decided that a tenancy was proved, and a determination of that tenancy by a regular notice, and a refusal on the part of the tenant to quit. And that being established, they held that it was not competent to the tenant to set up the title of a

*63] third *person. That seems to me to be perfectly good law, and consequently there is no ground for our entertaining this appeal.

The rest of the court concurring,

Appeal dismissed, with costs.

BAXENDALE and Others *v.* THE EASTERN COUNTIES RAILWAY COMPANY. *Feb.* 11.

A railway company were empowered by the 175th section of their act of incorporation (6 & 7 W. 4, c. cvi.) to charge certain tonnage-rates or tolls for all articles, matters, and things carried or conveyed along the line, and (by ss. 177 and 179) to provide locomotive or other power for the carriage and conveyance of passengers, cattle, goods, &c., and to make reasonable charges for such carriage and conveyance, in addition to the tonnage-rates.

By s. 182, it was provided that the company might "from time to time make such orders for fixing, and by such orders fix, the sum to be charged by them in respect of *small parcels*, not exceeding 1 cwt. each, as to them should seem proper."

And by s. 186, it was further provided that "the aforesaid rates and tolls to be taken by virtue of the act should at all times be charged *equally* and *after the same rate per ton* throughout the whole of the said railway, in respect of the same description of articles, matters, or things," and that "no reduction or advance in the said rates and tolls should either directly or indirectly be made partially or in favour of or against any particular person or company."

Under the powers given to them by s. 182, the company framed a scale of charges for the carriage of parcels not exceeding 1 cwt. each, which charges were higher than the tonnage-rates warranted by s. 175, but which included a reasonable charge for the use of their carriages and locomotive power under ss. 177 and 179. Under this scale, where a number of *separate parcels* (each weighing less than 1 cwt., but exceeding 1 cwt. if taken in the aggregate) were brought to the railway by the same person, and containing the same article, and *all directed to the same person* at their place of destination, the company charged the tonnage or lower rate allowed by s. 175: but, if similar parcels were brought *addressed to several different persons*, they were charged the higher or parcels rate.

Under a special case setting out these facts,—Held, that there was nothing to induce the court (or which ought to induce a jury) to infer that the charges so made were unreasonable, regard being had to the additional trouble incurred by the company.

Quære, whether the 186th section applies to "small parcels?" *Semble*, per Byles, J., that it does.

Though limited to a *reasonable* charge, there is no common-law obligation on a carrier to charge *equal* rates of carriage to all his customers.

The Railway Traffic Act, 17 & 18 Vict. c. 31, does not interfere with the right of a party aggrieved by overcharges, to maintain an action to recover back the sums paid in excess.

THIS was an action brought by the plaintiffs against the defendants, to recover back alleged overcharges in respect of goods sent by the plaintiffs from London to Norwich and Norwich to London by the defendants' *railway, and also damages in respect of such overcharges. By a judge's order, after issue joined, it was ordered that the [*64 questions of law should be stated in a special case, and that the damages, if any, should be assessed by an arbitrator, subject to the opinion of the court whether the plaintiffs were entitled to recover any special damages.

The plaintiffs are, and for many years have been, carriers, carrying on their business as such under the style and firm of Pickford & Co., and as such they have been in the habit of carrying goods for hire to and from, amongst other places, London to Norwich and Norwich to London.

The defendants are the Eastern Counties Railway Company, incorporated by the 6 & 7 W. 4, c. cvi., and the proprietors of the railway constructed under the powers of that act between London and Norwich.

The mode in which the plaintiffs carried on their business between London and Norwich, was and is, by collecting at their receiving-houses in those towns all parcels and packages of their customers to be sent from one to the other of those towns, and from such receiving-houses taking them to the stations of the defendants' railway in London and Norwich, and there delivering them to the defendants, to be carried by them from London to Norwich, and from Norwich to London, respectively, such parcels and packages being addressed to the several parties at London or Norwich for whom they are intended. Separate entries are made by the defendants of each parcel and package in the invoices and in the freight-notes, weigh-bills, and counting-house books, when the same are directed to different persons; and each package is weighed separately: but that is not the case when they are directed to the same ultimate consignee. At Norwich and London they were and are delivered in separate packages at the same *time by the defendants to the [*65 plaintiffs, and by them delivered to their customers, or their consignees, according to the different addresses on such parcels respectively. There is no other railway from London to Norwich except the defendants'; and the plaintiffs, unless they so used the defendants' railway, could not have carried or carry the goods of their customers with the same celerity as now, or carry on their business with the same convenience, advantage, and profit. All the parcels and packages mentioned

in this case were delivered by the plaintiffs to the defendants at one of their said stations, to be carried by them, and they were so carried, from London to Norwich or Norwich to London, and were parcels and packages which the plaintiffs were employed by their customers to carry as common carriers, as before described.

By s. 175 of the defendants' act, 6 & 7 W. 4, c. cv.i, they are authorized to demand, receive, and recover for the tonnage of all articles, matters, and things which are carried or conveyed upon or along the said railway, or any part thereof, rates and tolls on, amongst other things, all silk, cotton, linen, and woollen manufactures, raw-silk, raw-cotton, cotton-thread, dye-stuffs, groceries, earthenware, hardware, iron and other metals, and all articles of merchandise not otherwise charged, any sum not exceeding 6*d.* per ton per mile.

By s. 177 of the same act, the defendants are authorized (if they shall think proper) to use and employ locomotive and other engines or other motive power, and in carriages and wagons drawn or propelled thereby to carry and convey upon the said railway, and also upon and along any other railway communicating therewith, all such passengers, cattle, goods, wares, and merchandise, articles, matters, and things, as shall be offered to them for that purpose, and to make such reasonable
*66] charges for such carriage and conveyance, as *they may from time to time determine upon, in addition to the several tonnages and tolls thereinbefore authorized to be charged and received.

Section 179 enacts that it shall be lawful for the defendants, and they are thereby empowered, to provide locomotive engines, or other motive power, for the drawing or propelling of any articles, matters, or things, persons, cattle, or animals, upon the said railway, and also along and upon any other railway communicating therewith, and to receive, demand, and recover such sums of money for the use of such engines or other power as the said defendants should think proper, in addition to the several rates, tolls, or sums by that act authorized to be taken.

Section 182 provides that the defendants may from time to time make such orders for fixing, and by such orders fix, the sum to be charged by them in respect of small parcels not exceeding 1 cwt. each, as to them shall seem proper.

Section 186 provides "that the aforesaid rates and tolls to be taken by virtue of this act shall at all times be charged equally and after the same rate per ton throughout the whole of the said railway, in respect of the same description of articles, matters, or things; and no reduction or advance in the said rates and tolls shall, either directly or indirectly, be made partially or in favour of or against any particular person or company, or be confined to any particular part of the said railway, but that every such reduction or advance of rates and tolls upon any particular kind or description of articles, matters, or things, shall extend to and take place throughout the whole and every part of the said railway upon and in respect of the same description of articles, matters, and things so reduced, or advanced, and shall extend to all persons whomsoever using the same or carrying the same description of articles,
*67] *matters, or things thereon, anything to the contrary thereof in any wise notwithstanding."

Under the power given by s. 182, the defendants framed a scale of charges, by which the rates for the carriage of parcels not exceeding 1

cwt. each from London to Norwich, and vice versâ, were higher than the charges which the defendants were entitled to receive and did receive under section 175; but such rates included, not merely the tolls for the use of the railway under section 175, but also a reasonable charge for the use of their carriages and locomotive power under sections 177 and 179.

In all cases in which a number of separate parcels or packages were brought and delivered to the defendants at the same time by the plaintiffs or others of the public, to be carried, which, if taken separately, would weigh less than 1 cwt., but which, if taken in the aggregate, would weigh more than 1 cwt.,—if they all contained the same article, and were *directed to the same party*, the defendants charged them in the aggregate, and according to the tonnage or lower rate of charges allowed by section 175; whereas, if a number of separate parcels or packages of the same kind and weight were brought and delivered by the plaintiffs to the defendants under similar circumstances (*except that they were addressed to several persons, instead of to one person only*), the defendants charged to the plaintiffs the parcel-rate, although such parcels or packages were all delivered to the defendants by the plaintiffs at the same time and place, and were also received at the other end by the plaintiffs from the defendants at the same time and place. Thus,—if ten packages of $\frac{3}{4}$ of a cwt. each, containing the same article, and addressed to the same consignee, were brought by one of the public, or by the plaintiffs, the whole would be charged in the aggregate at the tonnage-rate on $7\frac{1}{2}$ cwt.; but, if *such packages were brought by one of the public, or by the plaintiffs, addressed to different parties, they would be charged by the parcel-rate as ten parcels, although delivered by the plaintiffs to the defendants at the same time, and also consigned to the plaintiffs and received by the plaintiffs from the defendants at the other end at the same time. If, amongst a number of separate packages so brought by the plaintiffs to the defendants to be carried, some were addressed to the same person, whilst the others were addressed to different persons, the defendants then lumped together in one weight those addressed to the same person, and charged them in the aggregate according to the tonnage or lower rate only; whereas, with respect to the others, they charged the higher or parcel-rate for each package under 1 cwt. in weight. [*68

No other carriers use the defendants' railway. A weigh-bill showing this mode of charging is appended to and to be taken as part of this case. (See following page.)

This practice continued for some months previous to September, 1856. The plaintiffs from time to time complained to the defendants of this mode of charging, and objected to it, and claimed to be charged according to the lower scale, in the same manner as if the parcels had been all addressed to the same consignee. They continued, however, to send goods by the defendants from Norwich to London, and vice versâ, paying to the defendants according to the higher scale, as demanded.

During the months of September, October, and November, 1856, the plaintiffs delivered to the defendants at London and Norwich respectively, to be carried as aforesaid, goods in separate packages, each under 1 cwt. in weight, but always at the same time, addressed to different consignees, and containing the same articles as aforesaid, and upon each occasion protested against the defendants' mode of charging, and insisted

*69] *The Eastern Counties Railway Company

Carrying Department. 23/10/56.

Messrs. Pickford & Co.,

To The Eastern Counties Railway Company.

R. Moseley, Manager.

		No. of Articles.	Species of Goods.	Weight.	Rate.	Paid on.	Cartage.	Freight.	Total.
Wilson . . .	Nov.	1	Parcel Drapery .	" " 22	ea.			1 0	
Bollingbrook	"	2	Trusses do . . .	" " 24	"			1 0	
Rigg & Co. .	"	1	do. do . . .	3 2 24	1/4			4 9	
Warner . . .	"	1	Parcel do . . .	" 20	ea.			1 2	
Povey . . .	"	2	do. do . . .	" " 20	"			1 0	
Beane . . .	"	1	Chest Leather . .	1 0 26	ea.			1 2	
Homan . . .	"	3	Hampers do . .	4 3 9	9			3 8	
Loman . . .	"	1	Bag do . .	" 1 0	ea.			0	
Snowden . .	"	1	Truss Twine . . .	1 1 17	ea.			1 2	
Wodehouse .	"	1	Box Soap	" 1 6	ea.			1 0	
Custance . .	"	1	" Books . . .	" 1 6	ea.			1 0	
Watson . . .	"	1	Package Frames	" " 14	ea.			1 0	
				13 1 0				18 11	
			Paid J. Constable 23/10/56						
	Drapery	4 3 6	@ 1/4	6 5					
	Leather	6 1 7	@ 9	4 9					
	Twine .	1 1 17	ea	1 2					
	Soap . .	0 1 6	"	1 0					
	Books .	0 1 6	"	1 0					
	Frames .	0 0 14	"	1 0					
	Box . .	0 0 6	"	1 0				16 4	

*on the plaintiffs' right to be charged according to the lower or tonnage-scale. This the defendants declined to accede to, and insisted on the plaintiffs' paying according to the higher or parcels-scale. The plaintiffs on each occasion paid the higher or parcels-scale under protest; and the goods were received and carried by the defendants. The sums so paid by the plaintiffs to the defendants under protest,—being the difference between the tonnage-scale and the parcels-scale in respect of such goods,—amounted to 26*l.* 9*s.* 5*d.* The plaintiffs contend that to this extent they have been deprived of their profits as carriers in respect of such goods. They also allege, that, by the course adopted by the defendants, they have been injured in their trade, by being unable to carry goods for their customers at so low a rate as they otherwise would have been; and thus have lost much custom, and been unable so well to compete in the carriage of goods with the defendants. They also allege that they have been put to great trouble in paying, as before mentioned, the difference to the defendants under protest, and keeping accounts of such payments; and that they have also been obliged to charge their customers a higher rate for carriage between London and Norwich, to the detriment and injury of their trade as carriers. [*70

The defendants contend, that the plaintiffs have no right to have their parcels carried upon any other terms than the above; and that it is for the plaintiffs' own advantage that they undertake the delivery to their customers of the different parcels. The defendants make a separate charge to the rest of the public for the delivery of parcels at the places designated, in addition to the charge for carrying the parcels on the railway. The same mode of charging has been adopted by the defendants ever since the opening of their railway. The defendants contend, that, even if the *plaintiffs are entitled to the 26*l.* 9*s.* 5*d.*, they are not entitled at law to more damages, upon any of the other grounds alleged. [*71

The court was to be at liberty to draw from the above facts any conclusions which in their judgment a jury ought to have drawn.

The questions for the opinion of the court were,—

First, whether the defendants were bound to carry for the plaintiffs all or any of the goods so delivered to them by the plaintiffs, at or for the lower or tonnage-rate?

Secondly, whether the plaintiffs are entitled to recover from the defendants the said sum of 26*l.* 9*s.* 5*d.* paid by them to the defendants under protest under the circumstances stated in the case?

Thirdly, whether the plaintiffs were entitled to recover from the defendants, beyond the said sum of 26*l.* 9*s.* 5*d.*, damages for the alleged wrongful refusal by them to carry the said goods at or for the said rates?

The verdict on the several issues was to be entered in such manner and form as to the court should seem proper.

C. Pollock (with whom was *W. H. Willes*), for the plaintiffs.(*a*)—This

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the defendants were bound to carry for the plaintiffs the goods mentioned in the case at the lower or tonnage-rate, and were not entitled to charge the higher or parcels-rate.

"2. That the fact that the separate packages were addressed to different persons did not entitle the defendants to charge the higher or parcels-rate, inasmuch as the goods were all delivered at one time and in one consignment, to be delivered to the plaintiffs.

*72] court held, so long ago as the case *of Parker *v.* The Great Western Railway Company, 7 Scott, N. R. 875, 7 M. & G. 253 (E. C. L. R. vol. 49), that the company, as common carriers, are bound to carry for all persons upon equal terms. [WILLIAMS, J.—That turned upon the construction of the company's acts. WILLES, J.—Is it not a question for a jury whether the difference of trouble, in the case of several parcels addressed to several different persons, does not justify a difference of charge?] In Crouch *v.* The Great Western Railway Company, 11 Exch. 742,† the Court of Exchequer held, that a railway company cannot legally charge a greater sum for the carriage of a package containing several parcels belonging to different persons, than for a package containing several parcels all belonging to one person. There, Martin, B., in a very luminous judgment, goes through all the cases bearing upon this question. He says: "The first case on this subject is, Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399.† That was a special case prepared by the parties, who wished to ascertain what the law was on the subject of packed parcels. Several packages had been made up by the plaintiffs, and tendered to the defendants, for the express purpose of having the law settled; and it was supposed that the decision on the questions then raised would have set the matter at rest. The case was argued on behalf of the company by the late Mr. Cowling (one of the most acute and able men ever at the bar); and the only additional risk which suggested itself to his mind was, that, by reason of goods belonging to different people being contained in one parcel, the *73] carrier might be *liable to several actions at the suit of the different owners, instead of one action at the suit of a single owner. The court were of opinion that the plaintiff was entitled to judgment: and Baron Parke, in delivering it, read the following passage, which was not necessary for the decision of the case:—'But then it is argued on the part of the defendants, that there really is an increased responsibility, arising from the simple fact that each parcel is the property of a distinct owner, because it is said that, in the event of a misdelivery, the company would be liable to several actions of trover, instead of one; and, even in case of loss or damage by neglect, each separate owner might maintain an action on the custom of England in respect of his own goods. It is very doubtful at least, whether, on the custom of England, separate actions could be maintained, as the relation of employer and carrier would not have subsisted between them and the company but between them and the plaintiffs. As actions of trover, however, could be maintained, it would not be unreasonable to allow some additional remuneration on account, not of the liability to pay greater damages, for they would be the same in both cases, but to pay the same damages by means of different suits. We are relieved, however, from the necessity of deciding what the precise amount of additional compensation (which at all events would be trifling) on this account should be, because it is admitted on the special case that the sum tendered is proper, unless the defendants had a right to charge for separate parcels,' &c. Now, that is the origin of all the controversy

"3. That the plaintiffs are entitled to recover back from the defendants the difference between the tonnage and the parcels-rate, paid under protest.

"4. That the plaintiffs are also entitled to recover from the defendants damages beyond such difference, for the trouble, expense, and annoyance to which they have been put, for the injury to their business, and for the infringement of their rights by the defendants."

which has taken place on this subject: and I listened at the trial, and have listened now, for any distinction to be pointed out between packed parcels and enclosures, except this; and I have heard none. The next case is that of Parker *v.* The Great Western Railway Company, 7 M. *& G. 253 (E. C. L. R. vol. 49), 7 Scott N. R. 835; and all that there passed having reference to this subject, was, that the court, [*74 in a deliberate judgment, decided that there was no distinction between carriers and other people. I agree with Mr. Clarke, that there is nothing in that case conclusive of the present: but, in a subsequent case of Parker *v.* The Great Western Railway Company, 11 C. B. 545 (E. C. L. R. vol. 73), this point was expressly raised by the fourth and fifth questions; and the court were of opinion that Mr. Parker, who stood in the same position as the present plaintiff, was entitled to recover. Maule, J., in distinct terms, says that there is no difference whatever between a parcel sent to an individual containing parcels belonging to a variety of people, and parcels sent to an individual, all the contents being his own. There is, therefore, an express decision of the Court of Common Pleas upon the very point now in controversy. But the misfortune is, that it does not seem to have occurred to the courts to call attention to what was thrown out in Pickford *v.* The Grand Junction Railway Company. In a case of Crouch *v.* The Great Northern Railway Company, 9 Exch. 556,† which was identical with the present, the counsel for the defendants treated the decision of the Court of Common Pleas as conclusive: and Parke, B., said,—'The Court of Common Pleas have already decided the point, and we are bound by their decision.' There is, therefore, the express decision of the Court of Common Pleas; and the only proper mode of raising the question again, is, by writ of error." Assuming, then, that the company are not justified in imposing upon a package the higher rate of charge because it is made up of several parcels, though addressed to several different persons,—the question is, whether the mere fact of the parcels being delivered to and received from the company without being enclosed in one package, the person so delivering them to and so *receiving them from the [*75 company being the same, will justify the company in imposing an increased charge, because they happen to be addressed to several ultimate consignees, with whom the company have nothing to do. [WILLIAMS, J.—Is it not a question for a jury, whether the difference of trouble in separately weighing and entering the parcels so differently addressed will justify the difference of charge?] The directions on the parcels are not for the guidance of the company: and if they choose, for their own convenience, separately to weigh and enter each parcel, they have no right to make that a pretext for an extortionate charge. The 186th section of the company's act is conclusive.

Bovill, Q. C. (with whom was *Holland*), for the defendants.(*a*)—This

(*a*) The points marked for argument on the part of the defendants were as follows:—

"That the defendants were entitled under the provisions of their act set out in the special case, and under the circumstances therein stated, to adopt the mode of charging complained of

"2. That the facts found show that no preference was, directly or indirectly, by such mode of charging, shown to the public or any other persons over the plaintiffs.

"3. That the facts found show that the benefit derived from the waiver by the defendants, in certain cases, of their right to charge parcel-rate upon separate packages, was shared alike by the public and the plaintiffs.

"4. That, even if the plaintiffs are entitled to recover 26*l.* 9*s.* 5*d.*, the amount of the alleged

*76] company, which was originally *incorporated by the 6 & 7 W. 4, c. cvi., for the purpose of making a railway from London to Norwich, are empowered by s. 175 to demand and receive certain tonnage-rates upon all articles, matters, and things carried upon or along the railway. The rates now in question have no connection with the tonnage-rates there mentioned. The 177th section empowers the company, if they shall think proper, to use and employ locomotive or other engines, or other motive power, and in carriages and wagons drawn or propelled thereby to carry and convey upon the said railway, &c., all such passengers, goods, &c., as shall be offered to them for that purpose, and to make such reasonable charges for such carriage and conveyance as they may from time to time determine upon, in addition to the tonnage-rate before mentioned. By s. 179, the company are empowered to provide and charge for locomotive engines or other motive power. The 182d section relieves the company, as to "small parcels," from the restriction imposed by s. 177; for, it enacts "that it shall be lawful for the said company from time to time to make such orders for fixing, and by such orders to fix, the sum to be charged by the said company in respect of small parcels not exceeding 1 cwt. each, as to them shall seem proper." The plaintiffs rely upon the 186th section, which clearly applies to tonnage-rates, and not to small parcels: it provides and enacts "that the aforesaid rates and tolls to be taken by virtue of this act shall at all times be charged equally and after the same rate *per ton* throughout the whole of the said railway, in respect of the same description of articles, matters, or things, and that no reduction or advance in the said *77] *rates and tolls shall either directly or indirectly be made partially or in favour of or against any particular person or company, or be confined to any particular part of the said railway, but that every such reduction or advance of rates and tolls upon any particular kind or description of articles, matters, or things, shall extend to and take place throughout the whole and every part of the said railway upon and in respect of the same description of articles, matters, and things so reduced or advanced, and shall extend to all persons whomsoever using the same, or carrying the same description of articles, matters, or things thereon, anything to the contrary thereof in anywise notwithstanding." [BYLES, J.—Is not the provision in the general act,—the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 90,—incorporated with the local act?] No: only as to the extension acts.(a) Besides, the general act was found, in practice, so far as this question is concerned, to be a dead letter. [CROWDER, J.—The giving undue preferences is now restrained only by Mr. Cardwell's act, 17 & 18 Vict. c. 31, s. 2.] That act merely gives power to this court to afford relief by injunction, but does not enable the party aggrieved to recover back the tolls charged in excess. [CROWDER, J.—There is a positive prohibition.]

overcharges, they are not entitled at law to any special damage, upon any of the grounds alleged in the declaration; but that they can only recover in this action the amount of the said overcharges.

"5. That, even if the mode of charging be held to be incorrect, still the facts found negative the averments in the first and second counts of the declaration, that the defendants wilfully and maliciously intended to injure the plaintiffs, to destroy their said business, and diminish their said profits, and to create and establish for themselves, the defendants, a monopoly of the business of carriers from London to Norwich and from Norwich to London."

(a) See 7 & 8 Vict. c. lxxxv., 8 & 9 Vict. c. xcvii., 9 & 10 Vict. c. liii., 9 & 10 Vict. c. cclxxx.

Not under a penalty. [WILLIAMS, J., referred to Stevens *v.* Jeacocke, 11 Q. B. 731 (E. C. L. R. vol. 63). WILLES, J.—The 6th section of the 17 & 18 Vict. c. 31, is decisive of this matter: it enacts that "no proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but *nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law.*"] The judgment of this *court in Parker *v.* The Great Western Railway Company, [*78
7 Scott N. R. 835, 7 M. & G. 253, leaves this still an arguable point. Under the Railway Traffic Act, 17 & 18 Vict. c. 31, the court has on more than one occasion recognised the right of the company to make a difference in their charges where it is shown that there is a difference in the cost of carriage to the company: see Ransome *v.* The Eastern Counties Railway Company, 1 C. B. N. S. 437 (E. C. L. R. vol. 87); Oxlade *v.* The North Eastern Railway Company, 1 C. B. N. S. 454. All these acts are in pari materiâ; and the whole course of the legislation upon the subject shows that these provisions for equal charges were intended to apply to the tonnage-rates only, and not to the charges imposed by railway companies as carriers: and therefore, it is submitted, the 186th section of the 6 & 7 W. 4, c. cvi., has no application here. It is hardly necessary to refer to the common law rights of carriers. Parker *v.* The Great Western Railway Company was decided upon the construction of the acts relating to that company, which are altogether different from the act in question. [WILLIAMS, J.—In Smith's Leading Cases, 4th edit. 174, speaking of the liabilities of carriers, it is said that "the hire charged must be no more than a reasonable remuneration to the carrier, and, consequently, not more to one (though a rival carrier) than to another, for the same service:" but all the authorities cited are railway cases.(*a*) BYLES, J.—I know no common law reason why a carrier may not charge less than what is reasonable to one person, or *even carry for him free of all charge. [*79
The 186th section of the act seems to be a mere proviso on the 185th section, which enacts "that it shall be lawful for the said company, from time to time, as they shall think fit, to reduce all or any of the rates, tonnages, tolls, or duties by this act authorized to be taken, and to take the reduced rates, tonnages, tolls, or duties, and afterwards from time to time again to raise the same or any of them, and to take such higher rates, tonnages, tolls, or duties, so that the same respectively shall not at any time exceed the amount by this act authorized."] So far as the act is concerned, there is nothing to disentitle the company to charge any sum they please in respect of small parcels, however unreasonable: and there is nothing in the special case to show that any preference is given to any one as against the plaintiffs. [WILLES, J.—If the statement of facts does not imply a preference as against Messrs. Pickford & Co., there is an end of the case. It had better be amended by averring that in point of fact packages under similar circumstances

(*a*) Pickford *v.* The Grand Junction Railway, 10 M. & W. 399,† Parker *v.* The Great Western Railway Company, 7 Scott N. R. 835, 7 M. & G. 253 (E. C. L. R. vol. 49), Parker *v.* The Bristol and Exeter Railway Company, 6 Exch. 702,† Crouch *v.* The Great Northern Railway Company, 9 Exch. 556,† Parker *v.* The Great Western Railway Company, 11 C. B. 545 (E. C. L. R. vol. 73), and Edwards *v.* The Great Western Railway Company, 11 C. B. 588.

never were brought by any one else.] It certainly was not intended to be inferred from the statement of the case that the rest of the public would be charged at a rate different from that charged to the plaintiffs, under the like circumstances. But, assuming that the 186th section does apply, and that the company are bound to charge equal rates for carriage to all persons, that must mean where the circumstances are alike. It appears, that, where a number of small parcels (each weighing less than 1 cwt.) are brought to the railway by one party,—and consigned to one party,—whether loose or packed,—so that one weighing and one entry will suffice for the whole, and one responsibility only be incurred, they are carried at the lower rate of charge. But, what do
*80] the plaintiffs do? They take to the *terminus in London one hundred parcels, directed to one hundred different persons, at Norwich, with nothing upon them to indicate that they are consigned to the plaintiffs. The company are necessarily obliged to weigh and enter each of these parcels separately: whereas, if they were all packed or tied together, and addressed to one person, one weighing and one entry would suffice. It is said that this weighing and entering is for the company's own convenience, and ought not to be made a pretext for increasing the charge. But, suppose, on their arrival at Norwich, the plaintiffs demand the hundred parcels, and ninety-nine only are produced,—how is the hundredth parcel to be accounted for or traced unless the company keep an account of the particulars and weight of each? The account annexed to the case shows the amount of trouble that is imposed upon the company by this course of dealing. [WILLES, J.—Is the excess charged here more than a reasonable equivalent for the extra trouble occasioned to the company?] Assuming it to be unreasonable, the plaintiffs are clearly not entitled to recover it back. [WILLIAMS, J.—I do not see how we can be called upon to say that there is anything unreasonable, under the circumstances, in the difference of charge.]

C. Pollock, in reply.—Pickford & Co. are both consignors and consignees; and each delivery of parcels is accompanied by a consignment note. The circumstance of an ulterior destination appearing upon each parcel, is utterly immaterial as between the plaintiffs and the company; for, they incur no responsibility to any other person than those who employ them to carry.

WILLIAMS, J.—I am of opinion that the defendants are entitled to
*81] our judgment. I was at first under the *impression that the parcels in question had something on the face of them to show that they were consigned to Pickford & Co. But, when the facts come to be known, it seems to me that we are not called upon to trouble ourselves with the construction of the 186th section of the 6 & 7 W. 4, c. cvi., or to inquire whether or not it applies to parcels or packages under 1 cwt. There is no evidence upon the face of the special case from which the court or a jury could come to the conclusion that there has been any inequality in the charges for carriage made to the plaintiffs as compared with other persons having goods carried under the like circumstances. It appears that the company charge a higher rate for the carriage of several parcels addressed separately to several different persons, than they charge for the same parcels if all addressed to one consignee. I see nothing unreasonable in that. Where a number of parcels are directed to a

number of different persons, some additional trouble and expense must necessarily be incurred by the company in their transmission and delivery.

CROWDER, J.—I am of the same opinion. The first question submitted for our consideration, is, whether the defendants were bound to carry for the plaintiffs all or any of the goods delivered to them by the plaintiffs under the circumstances stated in the special case, at or for the lower or tonnage-rate. I agree with my Brother Williams that it is unnecessary for us on the present occasion to come to any conclusion as to the applicability of the 186th section of the 6 & 7 W. 4, c. cvi., because, assuming that that section does apply here, the plaintiffs were not entitled to have the goods in question carried at the tonnage-rate. It seems, that, where a number of parcels, each weighing less than 1 cwt., are addressed to the same individual, a lower *rate is [*82 charged than that which is imposed for the carriage of the same description of parcels when directed to different individuals. I, like my Brother Williams, was for some time under the impression that there was something on the face of the parcels to denote that the whole were to be delivered to Messrs. Pickfords. That, however, turns out not to be the fact. There is nothing but the ultimate address upon each parcel. This necessarily must entail upon the company some additional labour. Is it, then, necessarily unreasonable that they should make an additional charge for this increased labour? I see nothing on the face of this special case to induce me, or which ought to induce a jury, to conclude that the charge made here was an unreasonable one. Upon the whole, therefore, I am of opinion that the defendants are entitled to judgment.

WILLES, J.—I am of the same opinion; and I found my judgment entirely upon the fact which has been stated and admitted at the bar, and which we are to assume, that there was no direction upon the several parcels other than the direction to the persons to whom Messrs. Pickford & Co. were to deliver them. That fact should be considered as added to the case. The special case is not accompanied by the document of charge. We must assume from its non-appearance, that, when a number of small parcels are delivered to the company together, to be carried from the same person to the same person, the lower or tonnage-rate is charged, and not the small-parcels-rate; but that, if the parcels are directed to different persons, they are charged at the small-parcels-rate. It appears that the plaintiffs, as carriers, are in the habit of collecting parcels, and bringing them to the defendants in London (or at Norwich), to be carried for them to Norwich (or to London), and there delivered to an agent of the *plaintiffs, to be forwarded to [*83 their several destinations. The complaint is, that they are required to pay for such carriage the parcels-rate instead of the tonnage-rate; and the difference claimed in this action is 26*l.* 9*s.* 5*d.* It is clear upon the terms of the rule itself laid down by the company, the plaintiffs are not entitled to recover; for, that rule is confined to small parcels all of which are addressed to the same person. It must therefore be by reason of that part of the rule being unreasonable that the plaintiffs recover, if at all. It is unnecessary to consider how the matter would stand at common law. The passage referred to by my Brother Williams in the notes in p. 174 of the first volume of Smith's Leading Cases, undoubtedly is inaccurately expressed. Nor is it necessary to express any opinion upon the construction of the statute 6 & 7 W. 4, c. cvi. I am

of opinion that the direction of the parcels to several persons makes a material difference. A jury would necessarily assume that that would occasion an increased amount of trouble. I do not rely upon the course which the company choose to adopt. But, when the parcels arrive at the end of the line, if all are addressed to one person, the servants of the company could at once place them together: whereas, if addressed to different persons, each package must be searched for separately. That might, and obviously must, impose upon the company an additional trouble, for which it is not unreasonable that they should make an additional charge. The question is, what would be a reasonable sum for that. It is impossible for the court to say whether the alleged overcharge here is or is not unreasonable, though a jury might have means of coming to a conclusion. For these reasons, I think the defendants are entitled to judgment.

*84] BYLES, J.—I am glad to find that the court is enabled *to decide this case, without sending the matter to a jury. It has already been decided that "packed parcels" are to be carried at the lower or tonnage-rate: and it is admitted that loose parcels, if all addressed to the same individual, are also to be subjected to the lower charge: but this is an attempt to carry the concession further. This is the case of loose parcels, directed to several different persons, with nothing to enable any one to discriminate between them and any other parcels. That clearly must impose additional trouble upon the company. There is nothing on the face of the special case to show that the difference of charge was unreasonable: and the onus of showing that lies on the party who asserts the unreasonableness. To enable the court to decide in favour of the plaintiffs, they must be enabled to fix the smaller sum as well as that for which it is to be substituted. As to the 186th section of the 6 & 7 W. 4, c. cvi., it has become unnecessary to pronounce any opinion upon it; though I cannot help saying that nothing which has fallen from Mr. *Bovill* has induced me to think that that section is not applicable to this case.

Judgment for the defendants.

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*85] *HALE and Another *v.* RAWSON and Others. *Feb.* 9

Where there is an agreement to deliver goods on a condition which, without any default on the part of the vendor, never happens, he will not be liable for a non-delivery: but, where the agreement is absolute, or conditioned on an event which happens, the vendor will be liable for a breach, though without default on his part; for, it is his own heedlessness, if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract.

The defendants contracted to sell to the plaintiffs 50 cases of East India tallow, at 48*s.* 6*d.* per cwt., to be paid for by the plaintiffs in cash fourteen days after finishing the landing thereof; to be delivered by the defendants to the plaintiffs on safe arrival of a certain vessel called The Countess of Elgin, then on passage from Calcutta to London:—Held, that this was an absolute contract to sell and deliver the tallow provided *the ship* arrived, and that the defendants were liable for a breach, notwithstanding that the non-delivery was occasioned by the ship's arrival (through no default on their part) without the tallow on board; and that the stipulation as to payment fourteen days after finishing the landing introduced no additional condition.

THIS was an action for an alleged breach of a contract for the sale of tallow.

The declaration stated, that, on the 17th of May, 1856, the defendants contracted and agreed to sell to the plaintiffs, and the plaintiffs then contracted and agreed to buy of the defendants, fifty cases of East India tallow, at the price of 48*s.* 6*d.* per cwt., to be paid for by the plaintiffs to the defendants in cash fourteen days after finishing the landing thereof, with 2½ per cent. discount; *to be delivered by the defendants to the plaintiffs on safe arrival of a certain ship or vessel called The Countess of Elgin*, then alleged to be on her passage from Calcutta to London; the quality to be equal to the sample by which the same was sold; but, should it turn out inferior to the sample, an allowance to be made, in the usual mode, by arbitration; but the said contract was not to be void on that account: Averment, that afterwards, and long before the suit, the said ship or vessel safely arrived at London, and the plaintiffs were, on such arrival, and at all times afterwards, ready and willing to accept and receive the said tallow, and to pay for the same according to the said contract, of which the defendants had notice; and a reasonable time for the delivery of the said tallow to the plaintiffs elapsed after the said arrival of the said ship or vessel and before the commencement of the suit, and all other things were done and observed and happened to entitle *the plaintiffs to have the said tallow delivered to them according to the said contract before the suit, and to maintain the [*86 suit: Breach, that the defendants had not delivered to the plaintiffs the said fifty cases of tallow, or any part thereof; and, by reason of the premises, the plaintiffs had lost and been deprived of the said tallow, and of the benefit of the said contract, and of divers profits and advantages which they might and would have acquired if the said tallow had been delivered to them according to the said contract: and the plaintiffs claimed 300*l.*

The defendants pleaded,—first, that they did not contract and agree as alleged,—secondly, that the said fifty cases of East India tallow did not, nor did any portion of that quantity, arrive in the said ship or vessel called The Countess of Elgin, when the said ship or vessel so arrived in London as in the declaration mentioned, without any default or negligence on the part of the defendants; whereby, without any default or negligence on their part as aforesaid, the defendants were unable to deliver the said fifty cases of East India tallow, or any part thereof, to the plaintiffs.

The plaintiffs took and joined issue on these pleas, and also demurred to the second plea, the grounds of demurrer stated in the margin being, —"that the second plea affords no answer to the action; that the contract to deliver declared on is an absolute contract, and not dependent upon the arrival of the goods in the ship The Countess of Elgin." Joinder.

Watkin Williams, in support of the demurrer.(*a*)—*1. No property in the tallow passed by the contract to the plaintiffs, for, the [*87

(*a*) The points marked for argument on the part of the plaintiffs, were,—

"That the second plea affords no answer to the action.

"That, by the contract, the defendants were bound to deliver fifty cases of East India tallow upon the arrival of The Countess of Elgin, and that that obligation was not conditional upon the arrival of the tallow in that vessel.

"And that the mere inability of the defendants to perform their contract affords no answer to an action for a breach of it, even though such inability was occasioned without any fault or negligence of the defendants."

contract would have been satisfied by the delivery of any fifty cases of tallow, provided it answered the character of that which was agreed to be delivered: Wait *v.* Baker, 2 Exch. 1,†—even, perhaps, though it arrived contemporaneously by another vessel. In Albridge *v.* Johnson, 7 Ellis & B. 885 (E. C. L. R. vol. 90), the plaintiff agreed with one Knights to purchase from him 100 out of 200 quarters of barley which the plaintiff had seen in bulk and approved of; and he paid part of the price: it was agreed that the plaintiff should send sacks for the barley, and that Knights should fill the sacks with the barley, take them to a railway, place them upon trucks free of charge, and send them to the plaintiff; the plaintiff sent sacks enough for a part only of the 100 quarters; these Knights filled; and Knights also endeavoured to find trucks for them, but was unable to do so: the plaintiff repeatedly sent to Knights demanding the barley: Knights finally detained it, and emptied the barley from the sacks into the bulk: and the court held, that the property *in so much of the barley as was not put into the sacks* did not pass to the plaintiff. Lord Campbell, Coleridge, J., and Erle, J., also held, that the portion put into the sacks passed to the plaintiff,—hæsitante Crompton, J., on the ground that it did not appear quite clearly, that, at the time when the plaintiff demanded the barley, he knew that any portion had been put into the sacks, and that, therefore, his assent to the particular appropriation was doubtful. Lord Campbell there says: "No rule of the law of vendor and purchaser is more clear
*88] than this, that, until the *appropriation and separation of a particular quantity, *or* signification of assent to the particular *quantity*, the property is not transferred."(*a*) And Erle, J., says: "It is clear, that, where there is an agreement for the sale and purchase of a particular chattel, the chattel passes at once. If the thing sold is not ascertained, and something is to be done before it is ascertained, it does not pass till it is ascertained." 2. Assuming, even, that the property did pass, still the question remains, whether the contract is absolute, or subject to a condition that the tallow shall arrive, and arrive in the particular ship. It is submitted that the fair construction of the contract, upon all the authorities, is, that it is an absolute contract dependent only on the arrival of the vessel; and that the defendants are not excused from performing it, even though its performance should without any default of theirs become impossible. A contract for the sale of goods "on arrival,"—Boyd *v.* Siffkin, 2 Campb. 326,—"to be shipped" or "to arrive" by a particular ship,—Splidt *v.* Heath, 2 Campb. 57, n., Lovett *v.* Hamilton, 5 M. & W. 639,† Stockdale *v.* Dunlop, 6 M. & W. 224,† Johnson *v.* Macdonald, 9 M. & W. 600,†—or "that may be loaded,"—Hayward *v.* Scougall, 2 Campb. 56,—has been held to be subject to the double contingency of the arrival of the vessel named, and of the goods being on board. In Idle *v.* Thornton, 3 Campb. 274, the contract was contingent on the arrival of the tallow. But here the only contingency is, the arrival of the vessel named. The case of Fischel *v.* Scott, 15 C. B. 69 (E. C. L. R. vol. 80), as explained in Gorrissen *v.* Perrin, 2 C. B. N. S. 681 (E. C. L. R. vol. 89), is also an authority to show that the non-arrival of the tallow on board the Countess of Elgin did not excuse the defendants for the non-performance of their

(*a*) *Quære* whether his Lordship did not mean "and signification of assent to the appropriation and separation?"

contract. In Gorrissen *v.* Perrin, A. contracted to sell to *B. 1170 bales of gambier, "now on passage from Singapore, and [*89 expected to arrive in London per Ravenscraig and Lady Agnes Duff;" and this was held to be a warranty that the goods were *then on passage.* Cockburn, C. J., in giving the judgment of the court, there says: "Without desiring at all to interfere with the rule laid down in the cases referred to, we may, in passing, observe that we think it has been carried far enough, and that its effect may have been to introduce uncertainty into contracts which were not intended by the parties to be contingent on accidental circumstances, such as, the transfer of a cargo from one ship to another. We are, however, of opinion that the present case is plainly distinguishable from those referred to, by the statement that the goods were on board at the time the contract was entered into. We are of opinion that this statement amounts to a warranty; and although, if circumstances had subsequently occurred whereby the arrival of the goods had been prevented, the defendants might have been protected by the words 'expected to arrive,' we think they cannot resort to them to get rid of the positive assurance that the goods were then on their passage; on the faith of which, possibly, the purchaser may have entered into the contract to buy." So, here, the defendants might, if they chose, have inserted in the contract words which would have made the delivery of the tallow contingent on the double event. But not having done so, their contract became absolute on the arrival of the vessel. And this construction is in no degree affected by the stipulation for payment within a limited time after the landing of the goods.

Coleridge, contrà.(*a*)—1. This is a contract for the sale of a specific quantity of tallow, and consequently *immediately on the signing of [*90 the document, the property in the subject-matter of the sale passed to the purchaser: and, if the goods had been burnt or lost on the voyage, the defendants would clearly have been emancipated from the performance of their contract, the performance having by no default on their part become impossible. 2. Assuming that not to be so, the contract is conditional on the safe arrival of the Countess of Elgin with the 50 cases of tallow on board. This would be the natural and fair interpretation of the contract, if the matter were res integra. The price is to be paid "in cash fourteen days after finishing the landing thereof:" and the tallow is to be delivered "on safe arrival of a certain ship or vessel called the Countess of Elgin." In Boyd *v.* Siffkin, 2 Campb. 325, the contract was as follows,—"Sold for Mr. H. Siffkin to Mr. M. Boyd, about thirty-two tons, more or less, of Riga Rhine hemp, *on arrival* per Fanny and Almira, at 82*l.* 10*s.* per ton, &c., from the landing scale," &c.: and it was held that this meant *on arrival of the goods which the vessel was expected to bring;* and that, the vessel arriving empty, without any default on the part of the vendor, he was not liable

(*a*) The points marked for argument on the part of the defendants, were,—

"That, upon the true construction of the contract mentioned in the declaration, the property in the fifty cases of tallow ascertained and on board The Countess of Elgin, passed to the plaintiffs by the said contract, and that the said cases of tallow were the property and in the possession and at the risk of the plaintiffs from the time of the making thereof:

"And that the said contract was not an absolute contract on the defendants' part, to deliver to the plaintiffs the said cases of tallow on the arrival of The Countess of Elgin, but a contract on their part to deliver to the plaintiffs the said cases of tallow on the safe arrival of The Countess of Elgin with the said cases of tallow on board."

to the purchaser for the non-delivery. Hawes *v.* Humble, 2 Campb. 327, n., is rather more in point. There, the *contract was in these *91] terms,—"I have this day sold for and by your order, *on arrival*, 100 tons, more or less, of Teneriffe barilla, in your Bon Fim, from Teneriffe, to Messrs. Hawes & Co., at 41*s.* per cwt.," &c. The Bon Fim, from accidental circumstances, and without any default on the part of the sellers, arrived without any barilla. Baron Wood was of opinion that the contract was conditional; and the Court of Queen's Bench unanimously agreed with him. [CROWDER, J.—Have you found any case where "on arrival of a certain ship" has been construed to mean "on her arrival with the goods on board?"] That was assumed in Idle *v.* Thornton, 3 Campb. 374. In Alewyn *v.* Pryor, R. & M. 406 (E. C. L. R. vol. 21), the contract was as follows,—"London, 30 March, 1825. Sold this day, by order of Messrs. Pryor & Co. all the Galipoli oil on board the Thomas, Captain Nichols, above ninety tuns, say thirty to forty tuns (more or less), direct from Galipoli, on arrival in Great Britain, at 54*l.* per tun of 236 gallons, duty paid; usual allowance for dirt, grease, and water: to be delivered by sellers on a wharf in Great Britain, to be appointed by the buyers, with all convenient speed, but not to exceed the 30th of June next, and taken at the King's landing scale, and to be paid for in fourteen days from landing, in ready money, allowing seven months' discount." The ship did not arrive until the 4th or 5th of July, and the buyers declined to accept the oil, and brought an action for the alleged breach of contract. For the defendants it was objected "that the arrival was a condition precedent to the sale, and that the sellers meant, not to warrant the arrival of the oil by the 30th of June, but that, if the oil did not arrive sooner, the buyers would not be bound to accept it:" and Abbott, C. J., assenting to this view, nonsuited the plaintiff. In Lovatt *v.* Hamilton, 5 M. & W. 639,† the defend- *92] ants, by their broker, entered into a contract *for the sale to the plaintiffs of "50 tons of palm-oil, to arrive per The Mansfield, at 32*l.* per ton, &c.: in case of non-arrival, or the vessels not having so much in after delivery of former contracts, this contract to be void." At the time this contract was entered into, the defendants had several vessels on the coast of Africa for the purpose of obtaining palm-oil, and, amongst others, the Mansfield and the Watt. After the date of the contract, the Mansfield was loaded with 315 tons of palm-oil, and sailed homewards. On her arrival at Cameroons, the defendants' agent ordered the Captain of the Mansfield to trans-ship part of her cargo to the Watt, which was the larger vessel. This trans-shipment was accordingly made bonâ fide and without fraud, for the purpose of enabling the Watt to proceed home with a full cargo. The Watt proceeded on her voyage, and arrived in Liverpool on the 8th of April, 1838, and the Mansfield on the 20th of May following. The Mansfield, on her arrival, had on board 235 tons of palm-oil, but the contracts made previously to the above contract amounted to 228 tons, leaving only seven tons applicable to this contract, which were delivered by the defendants to the plaintiffs. In an action for the non-delivery of the oil, it was held that the arrival of the oil in the Mansfield was a condition precedent, and that the plaintiffs were not entitled to the oil brought by the Watt. There is no substantial difference between that case and this: the two contracts are almost identical. Stockdale *v.* Dunlop, 6 M. & W. 224,† only shows

that a contract for the sale of goods "to arrive" by a particular vessel, is a contract to sell the goods when they arrive. Johnson *v.* Macdonald, 9 M. & W. 600,† however, is expressly in point: there, the defendant by a bought and sold note agreed to sell to the plaintiffs "100 tons of nitrate of soda, at 18*s.* per cwt., *to arrive* ex Daniel Grant; to be taken from the *quay at landing weights, &c.: and below the signature of the brokers there was the following memorandum,—"Should the vessel be lost, this contract to be void:" and it was held that the contract did not amount to a warranty on the part of the seller that the nitrate of soda should arrive if the vessel arrived, but to a contract for the sale of goods at a future period, subject to the double condition, of the arrival of the vessel, with the specified cargo on board. [CROWDER, J.—By the terms of the contract there, the condition was that *the soda* should arrive.] So here, the tallow is to be delivered on the safe arrival of the ship,—having the tallow on board, of course; and the price is to be paid "fourteen days after finishing the landing thereof." Unless both ship and goods arrive, the contract cannot be performed. Parke, B., in giving judgment, there says: "I admit that, in the cases which have been referred to, with the exception of Lovatt *v.* Hamilton, 5 M. & W. 644,† and Stockdale *v.* Dunlop, 6 M. & W. 224,† the words used in the contract entered into were not simply the words 'to arrive,' but were, that the contract was to be completed 'on arrival' of the vessel. It appears to me, however, that the meaning of both these expressions is precisely the same. This is a contract not passing any property in any existing chattel on board the vessel at the time it was entered into, but merely an agreement for the sale and delivery of a portion of her cargo at a future period, viz., when the vessel should arrive: in short, that the goods are to be delivered at the quay out of the vessel, if she should arrive; in order to fulfil which condition a double event must take place, viz., the arrival of the vessel with the nitrate of soda on board. Such was the meaning put by the court on a similar contract in Lovatt *v.* Hamilton; and I must own that I, for my own part, never had the least doubt *as to the meaning of these words. The word 'to' does not [*94 mean that the goods 'shall' arrive, but merely that they shall be sold on their arrival. I think, therefore, that, according to its true meaning, the language of this contract renders the performance of it conditional on a double event,—the arrival in safety of the vessel and her cargo." [CROWDER, J.—The question is whether the defendants do not by the terms of this contract guaranty that the Countess of Elgin shall have the 50 cases of tallow on board, and that the plaintiffs shall have them if the vessel arrives.] The stipulation as to payment fourteen days *after landing*, it is submitted, negatives that being the true construction of the contract.

Williams, in reply.—No property in any specific tallow passed by this contract. [WILLES, J.—The court are all of opinion that this is not a sale of a specific chattel.] In order to satisfy the contract, it was not necessary that the 50 cases of tallow should arrive by this particular ship. It is not a contract for tallow "to arrive ex The Countess of Elgin." In Alewyn *v.* Prior, R. & M. 406 (E. C. L. R. vol. 21), the sale was subject to the condition that the goods should arrive by a given day: that case, therefore, has no application. [WILLES, J.—It is to be regretted that the note is not set out in terms in the pleadings.] In

Johnson v. Macdonald, 9 M. & W. 600,† the only question was, whether the words "to arrive ex Daniel Grant" amounted to a warranty, or merely to a condition of sale, not whether they amounted to a condition of delivery. Alderson, B., says,—"When goods are to be sold on a condition to take effect at some future time, I agree in thinking that it is more rational to construe the words 'to arrive' in the light of a condition, than as amounting to a warranty." It may be conceded that the
*95] arrival of *the ship here was a condition precedent to the obligation on the defendants' part to deliver the tallow; but the arrival of the vessel is the only event provided for: and the absolute character of the contract is in no degree altered or affected by the subsequent stipulation that the defendant shall pay for the tallow in a given time after the defendants have performed their contract by completing the delivery of it.

WILLIAMS, J.—As to the first point, the court entertain no doubt at all. It is clear that the contract would have been satisfied by the delivery of any 50 cases of tallow answering the description given. Clearly, therefore, no property in any particular tallow passed by the bargain. The second point, however, presents some nicety; and, as it is likely to be one of general application, we will take a little time to deliberate upon it. Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

The principles of law applicable to this case are undisputed. Where there is an agreement to deliver goods to a vendee on a certain condition, and the condition (without any default on the part of the vendor) never comes to pass, it is plain that he will not be liable for a non-delivery. But, where the agreement is absolute, or conditioned on an event which happens, the vendor will be liable for a breach, although he could not help the non-performance; for, it is his own heedlessness, if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract.

The question, therefore, is, whether the agreement to deliver the
*96] tallow, stated in the declaration in this *case, is conditional on the arrival of the ship merely, or on her arrival with the goods on board. The contract alleged, is, to sell the tallow at a certain price, to be paid for fourteen days after finishing the landing,—to be delivered on safe arrival of The Countess of Elgin. The plaintiffs contend that this is an absolute contract to sell and deliver the tallow, provided the ship arrives. The defendants insist, that, as the price is not to be paid till a certain time after the landing, there is also an implied condition that the tallow shall arrive in the ship. Now, if there were no such stipulation as to the time of payment, the contract would surely be, to deliver the tallow out of the ship if she arrived, whether it should be possible or impossible to perform the contract. How, then, can it make any difference, that the plaintiffs undertake, in case the contract is performed by the defendants' delivering the tallow out of the ship, to pay for it within a certain time after it is landed. We think that this stipulation introduces no additional condition, and that, as the ship has arrived, there was nothing to absolve the defendants from performing their contract, and, consequently, that they are liable for a breach of it.

Judgment for the plaintiffs.

*REINDEL *v.* SCHELL. *Feb.* 10. [*97

The declaration stated, that, by a memorandum of agreement made between the plaintiff of the one part and the defendant of the other part, *it was witnessed*, that, in consideration, &c., the defendant agreed to become and be for five years assistant to the plaintiff in his art and profession of photographic colourer or painter, and would during the term give up his whole time and attention to superintending the same, in retouching and perfecting all such portraits, &c., as should be coloured or painted by the plaintiff in the prosecution of his said art or profession, and as the plaintiff should from time to time require,—that the defendant would not at any time during the term take employment from any other person, or be otherwise engaged in colouring, &c., any photographic portrait, &c.,—that the defendant would during the term do and perform all such acts, &c., in or relating to the said art or profession as the plaintiff should direct, and would not reveal any secret relating thereto,—and that the defendant would be just and faithful in his dealings, &c.: that *it was thereby further witnessed*, that, for and in consideration of the agreement on the defendant's part, the plaintiff thereby agreed to pay the defendant weekly a certain specified remuneration for every portrait, &c., which he should retouch to the plaintiff's satisfaction, and to guaranty that the defendant should be continually supplied with photographic portraits to be retouched, &c.: and that, *lastly, it was thereby mutually agreed and declared by and between the plaintiff and the defendant, that they should respectively forfeit the sum of 500l., to be paid to the other of them as liquidated damages, in the case of any breach being made by either of them in the true performance of the terms and conditions of the said agreement.* After averring performance by the plaintiff of all things necessary to entitle him to have the agreement performed by the defendant, the declaration alleged for breaches,—that the defendant did not continue the assistant of the plaintiff for the stipulated period, nor give the whole of his time in retouching portraits, &c., as required,—that, during that period, he took employment from other persons,—that he refused to perform certain acts in and relating to the said art or profession as the plaintiff required, and divulged secrets, &c.,—and that the defendant did not nor would during the term be just and faithful in his dealings, &c.; and it concluded as follows: "by reason of which said several premises the defendant forfeited and became liable under and by virtue of the agreement to pay to the plaintiff the said sum of 500*l.*, *as liquidated damages*, but the defendant has not paid the same, or any part thereof, and the plaintiff claims 500*l.*"

The defendant pleaded, "to the plaintiff's claim of 500*l.* as and for liquidated damages," that the said memorandum of agreement was and is in the words and figures following (setting it out); averment, that the 500*l.* in the agreement mentioned was a *penalty*, and not *liquidated damages*, and that the defendant was not liable to pay to the plaintiff the said sum of 500*l.* as and for liquidated damages, in manner and form as in the declaration alleged:—

Held, on demurrer (dubitante Willes, J.), that the concluding averment in the declaration that the defendant became liable to pay the 500*l.* *as liquidated damages*, but had not paid the same, was a mere erroneous allegation of an inference of law, and immaterial, it being sufficiently apparent on the declaration that the 500*l.* was a penalty, and not *liquidated damages*, and that the plea was bad, as being a mere plea to damages.

THE declaration stated, that, by a memorandum of agreement in writing made and dated the 6th of September, 1853, between the plaintiff of the one part, and the defendant of the other part, after reciting as therein is recited, *It was witnessed*, that, in consideration of the plaintiff having, at the request of the defendant, paid the expenses of the defendant's journey to London, and for other the considerations in the said agreement and thereinafter expressed, the defendant agreed with the plaintiff forthwith to become and be, *and continue [*98
thenceforth during the term of five years, to be computed from
the day of the date of the said agreement, if the plaintiff and the defendant should both of them so long live, assistant of and to the plaintiff in his the plaintiff's art and profession of photographic colourer or painter, and should and would during the said term give up his whole time and attention to superintending the same, in retouching and perfecting all such portraits, pictures, and other articles and things as should be coloured or painted by the plaintiff in the prosecution of his

said art or profession, and as the plaintiff should from time to time require the same to be done; and that the defendant should not nor would at any time during the said term take employment from any other person or persons whatsoever, or be otherwise engaged in colouring or painting, or in retouching, any photographic portrait or other picture; and also that he the defendant should and would, during the said term, do and perform all such acts, matters, and things, in and about or relating to the said art or profession, as the plaintiff should from time to time direct, order, and appoint, and should not nor would at any time thereafter, without the consent in writing of the plaintiff, divulge or make known any trust, secret, or dealing of or relating to the said art or profession; and that he the defendant should and would during the said term be just and faithful to the plaintiff in all his dealings and transactions connected with the said art or profession: And it was thereby further witnessed, that, for and in consideration of the agreement therein above and thereinbefore contained on the part of the defendant to be by him observed and kept, the plaintiff did thereby agree with the defendant to pay the defendant weekly and every week a remuneration, for every portrait, picture, or other article or thing
*99] which he should *well and perfectly retouch to the satisfaction of the plaintiff, at and after certain rates specified in that behalf in the said agreement, or to be from time to time settled and determined between them, and to guaranty that the defendant should be continually supplied with photographic portraits or pictures by the plaintiff, to be retouched and perfected under the plaintiff's direction by the defendant in pursuance of the said agreement: *And lastly it was thereby mutually agreed and declared by and between the plaintiff and the defendant, that they should respectively forfeit the sum of* 500*l.*, *to be paid to the other of them as liquidated damages, in the case of any breach being made by either of them in the true performance of the terms and conditions of the said agreement:* That, after the making of the said agreement, and before any breach thereof by either of the parties thereto, and during the said term of five years, on the 29th of June, 1855, by a certain other memorandum of agreement made and dated on that day, between the plaintiff of the one part, and the defendant of the other part,—after reciting that the defendant had since the date of the first above-mentioned agreement continued with and acted for the plaintiff as an assistant in his said profession, in accordance with the terms of the said agreement; and that the defendant had, at the request of the plaintiff, and for the considerations thereinafter expressed, agreed with the plaintiff to continue as such assistant for the further term of three years after the expiration of the said term of five years, if both of them should so long live,—It was witnessed that, in consideration of the defendant binding himself to continue the assistant of the plaintiff for the further term of three years from and after the expiration of the said term of five years, the plaintiff agreed with the defendant that the plaintiff
*100] should and would, on and after *the 6th of September, 1856, during the remainder of the said term of five years, pay to the defendant as a remuneration for his services as such assistant, for every portrait, picture, or other article which he should well and perfectly retouch to the satisfaction of the plaintiff, at and after certain rates or scales in the secondly mentioned agreement in that behalf particularly

specified and set forth, the same being larger and increased rates and scales of remuneration than and over the rates and scales in the first agreement mentioned; and it was by the second memorandum of agreement mutually agreed, that, during the remainder of the said term of five years, the plaintiff should be only liable and bound to pay to the defendant from week to week after the rate or scale mentioned in the first memorandum of agreement, and that the difference payable to the defendant on and according to the said larger and increased rates or scales should be payable and paid by the plaintiff to the defendant on the 6th of September, 1858: And the plaintiff agreed with the defendant, that, for every portrait, picture, or article which he should during the extended period of three years well and perfectly colour or retouch to the satisfaction of the plaintiff, he the plaintiff would weekly pay to the defendant after the increased and larger rate or scale in the second memorandum of agreement specified, and that the defendant should during such extended period of three years be continually supplied with photographic portraits or pictures to be retouched and perfected under the direction of the plaintiff: And the defendant, for the considerations in this behalf aforesaid, agreed with the plaintiff that he the defendant would, during the remainder of the said term of five years, faithfully and truly perform his part of the said agreement, and that he would during the said extended period of three *years be and continue [*101
the assistant of the plaintiff in his said art or profession, and upon the same terms and conditions as were mentioned and contained in the said first memorandum of agreement, save so far as the same were varied by the said second memorandum of agreement: And lastly, it was by the said second memorandum of agreement *mutually agreed and declared by and between the plaintiff and the defendant, that they should be respectively subject to the forfeiture of the sum of* 500*l.*, *to be paid to the other of them as liquidated damages, in the event of any breach being made by either of them in the true performance of the terms and conditions of the said second memorandum of agreement:* Averment, that, since the making of the said several agreements hitherto, the plaintiff had done everything on his part in the said agreements and each of them contained to be by him done, and had always been ready and willing to do everything in the said agreements and each of them contained which he ought on his part to do, and everything had happened necessary to entitle him to have the said last-mentioned agreement performed by the defendant on his part; but that the defendant, since the making of the said last-mentioned agreement, had broken and neglected and refused to perform the same, in this, that, during the said term of five years in the said first memorandum of agreement mentioned, he did not nor would continue the assistant of the plaintiff in his said art or profession, nor did nor would give up his whole time or attention to superintending the same, in retouching the said portraits, pictures, and other articles and things as agreed, and as the plaintiff required; and in this, that the defendant did, during the said term of five years, take employment from persons other than the plaintiff, and was and became engaged in colouring, painting, and retouching photographic *por- [*102
traits and pictures otherwise, that is to say, on his own behalf, and for other persons than the plaintiff, than was agreed between the defendant and the plaintiff; and in this, that, during the said term of

five years, the defendant did not nor would do or perform certain acts, matters, and things in, about, and relating to the said art and profession, as the plaintiff did from time to time during the said term direct, order, and appoint the defendant to do and perform, and did, during the said term, without the consent in writing of the plaintiff, divulge and make known certain trusts, secrets, and dealings of and relating to the said art and profession; and in this, that he the defendant did not nor would, during the said term of five years, be just and faithful to the plaintiff in his dealings and transactions connected with the said art or profession: By reason of which said several premises the defendant forfeited and became liable, under and by virtue of the agreements aforesaid, to pay to the plaintiff the said sum of 500*l.* as liquidated damages, but the defendant had not paid the same, or any part thereof: And the plaintiff claimed 500*l.*

Third plea,—to the plaintiff's claim of 500*l.* as and for liquidated damages,—that the said memorandum of agreement in the declaration firstly mentioned was and is in the words and figures following, that is to say, "Memorandum of an agreement made the 6th day of September, 1853, Between Albert Reindel, of Nuremberg, photographic artist, of the one part, and Anton Schell, of Frankfort-on-the-Maine, artist, of the other part: Whereas the said Albert Reindel practises the art or profession of colouring photographic portraits and other photographic pictures, and, in the pursuit of that art or profession, accepts public and other engagements to colour all such portraits and other photographic
*103] pictures as shall be required, at such public *establishments, or by the private persons with whom he shall enter into engagements: And whereas, he the said Albert Reindel, having occasion for an assistant in his art or profession of a photographic painter, to retouch and perfect under his immediate guidance and direction the various portraits and other pictures which in the course of his public and other engagements he shall be required to colour as aforesaid, hath applied to the said Anton Schell to become his assistant to retouch and perfect all such portraits, pictures, and other drawings which the said Albert Reindel shall undertake to, and shall, colour as aforesaid; which he the said Anton Schell hath agreed to do, for the period, and upon the terms, hereinafter mentioned. Now, this memorandum of agreement witnesseth, that, in consideration of the said Albert Reindel having paid the costs and expenses of the journey of the said Anton Schell to London, and for the considerations hereinafter contained and on the part of the said Anton Schell to be observed and performed, he the said Anton Schell, for himself, his executors and administrators, doth undertake, promise, and agree to and with the said Albert Reindel, that he the said Anton Schell shall and will henceforth, during the term of five years, to be computed from the day of the date of these presents, if both of them the said Albert Reindel and Anton Schell shall so long live, become, be, and continue assistant of the said Albert Reindel in his art or profession of a photographic colourer or painter, and shall and will during the said term give up his whole time and attention to superintend the same, in retouching and perfecting all such portraits, pictures, and other articles and things as shall be coloured or painted by the said Albert Reindel in the prosecution of his art or profession of a photographic colourer or

painter, and as the said Albert Reindel *shall from time to time require the same to be done; and that he the said Anton Schell [*104 shall not nor will at any time during the said term take employment from any other person or persons whomsoever, or be otherwise engaged in colouring or painting or in retouching any photographic portrait or other picture; and also that he the said Anton Schell shall and will during the said term do and perform all such acts, matters, and things in, about, or relating to the said art or profession of photography, and the painting, colouring, and retouching photographic portraits and other pictures, articles, and things, as he the said Albert Reindel shall from time to time direct, order, and appoint; and shall not nor will at any time hereafter, without the consent in writing of him the said Albert Reindel, divulge or make known any trust, secret, or dealing of or relating to the said art or profession of a photographic artist, painter, or colourer, of the said Albert Reindel; and also that he the said Anton Schell shall and will during the said term be just and faithful to the said Albert Reindel in all his dealings and transactions connected with his said art or profession of a photographic artist, painter, or colourer as aforesaid: And this memorandum of agreement further witnesseth, that, for and in consideration of the undertaking, promise, and agreement hereinbefore contained on the part of the said Anton Schell to be observed, kept, and performed, he the said Albert Reindel doth hereby undertake, promise, and agree that he the said Albert Reindel shall and will, weekly and every week, well and truly pay to the said Anton Schell a remuneration for every portrait, picture, or other article or thing which he shall well and perfectly retouch to the satisfaction of the said Albert Reindel, at and after the rate following, that is to say,—

Size.	Coloured.	Tinted.
	£. s. d.	£. s. d.
3½ × 4½	0 6 0	0 5 0
4 × 5	0 7 0	0 6 0
5½ × 7	0 9 6	0 7 0
7 × 9	0 12 0	0 9 0

and, for all other portraits or pictures of other dimensions, at and after the same rate, the actual amount to be paid to be estimated, settled, and determined from time to time by the said Albert Reindel; and, further, that he the said Albert Reindel shall, and he doth hereby undertake, promise, and agree, to guaranty that the said Anton Schell shall continually be supplied with photographic portraits or pictures by him the said Albert Reindel under his direction to be retouched and perfected by the said Anton Schell in accordance with and in performance of the terms of this agreement: And lastly, it is hereby mutually agreed and declared by and between the parties hereto, *that they shall be respectively subject to the forfeiture of the sum of* 500*l.*, *to be paid to the other of them, his executors or administrators, as liquidated damages, in the case or event of any breach being made by either of them in the true performance of the terms and conditions of the agreement hereby made and entered into.* In witness," &c.

And the defendant further says that the said memorandum of agree-

ment in the declaration secondly mentioned was and is in the words and figures following, that is to say,—"Memorandum of agreement, made the 29th day of June, 1855, Between the within-named Albert Reindel, of the one part, and the within-named Anton Schell, of the other part: Whereas the said Anton Schell has, since the date of the within agree-
*106] ment, continued with and acted for the said Albert *Reindel as an assistant in his profession of photographic artist in accordance with the terms of the within agreement: And whereas the said Anton Schell has at the request of the said Albert Reindel, and for the considerations hereinafter expressed, agreed with the said Albert Reindel to continue as such assistant for the further term of three years after the expiration of the within term of five years, if both of them the said Albert Reindel and Anton Schell shall so long live: Now, this memorandum of agreement witnesseth, that, in consideration of the said Anton Schell so binding himself to continue as the assistant of the said Albert Reindel as within mentioned for the term of three years from and after the expiration of the said period of five years as within mentioned, he the said Albert Reindel doth hereby agree with the said Anton Schell that he the said Albert Reindel shall and will, on and after the 6th day of September, 1856, during the remainder of the said period of five years, pay to the said Anton Schell, as a remuneration for his services as such assistant, for every portrait, picture, or other article which he shall well and perfectly retouch to the satisfaction of the said Albert Reindel, at and after the rates following, that is to say, for every portrait or picture which he shall well and perfectly colour or retouch as aforesaid between the 6th of September, 1855, and the 6th of September, 1856, after the rate or scale following, viz.,—

Size.	Highly coloured.	Slightly coloured.	Tinted.
	£. s. d.	£. s. d.	£. s. d.
3½ × 4½	0 7 0	0 6 0	0 5 0
4 × 5	0 9 6	0 7 0	0 6 0
5½ × 7	0 12 0	0 9 6	0 7 0
7 × 9	0 15 0	0 12 0	0 9 0

*107] *"For every portrait or picture which the said Anton Schell shall so perfectly colour or retouch as aforesaid between the 6th day of September, 1856, and the 6th day of September, 1857, after the rate or scale following, viz.,—

Size.	Highly coloured.	Slightly coloured.	Tinted.
	£. s. d.	£. s. d.	£. s. d.
3½ × 4½	0 9 6	0 6 0	0 5 0
4 × 5	0 12 0	0 7 0	0 6 0
5½ × 7	0 15 0	0 9 6	0 7 0
7 × 9	0 18 0	0 12 0	0 9 0

"For every portrait or picture which the said Anton Schell shall so perfectly colour or retouch as aforesaid during the last year of the

within-mentioned period of five years, after the rate or scale following, viz.,—

Size.	Highly coloured.	Slightly coloured.	Tinted.
	£. s. d.	£. s. d.	£. s. d.
3½ × 4½	0 10 0	0 7 0	0 5 0
4 × 5	0 14 0	0 9 6	0 6 0
5½ × 7	0 16 0	0 12 0	0 7 0
7 × 9	1 0 0	0 15 0	0 9 0

"And for all other portraits or pictures of other dimensions, at and after the rates set out in the above scales, the actual amount to be estimated and determined by the said Albert Reindel; such increased rates to be in substitution of the rates or scales set out in the within agreement: And it is hereby mutually agreed, that, during the remainder of the said term of five years, the said Albert Reindel shall be only liable and bound to pay the said Anton Schell from week to week, as within mentioned, after the rate or scale mentioned in the *within agreement, the difference payable to the said Albert Schell on the [*108 amended scale being ascertained in every such weekly settlement, and the amount of such difference entered in two memorandum books, one to be kept by each party, and to be signed by each of them; and the total amount of such difference to be payable and to be paid by the said Albert Reindel to the said Anton Schell on the 6th of September, 1858: And the said Albert Reindel doth hereby agree with the said Anton Schell, that, for every portrait, picture, or other article which he shall during the extended period of three years well and perfectly colour or retouch to the satisfaction of him the said Albert Reindel, he the said Albert Reindel will weekly pay to the said Anton Schell after the scale or rate lastly hereinbefore set out, and will guaranty that the said Anton Schell shall during such extended period of three years be continually supplied with photographic portraits or pictures to be retouched and perfected under the direction of the said Albert Reindel: And the said Anton Schell, for the considerations aforesaid, hereby promises and agrees with the said Albert Reindel, that he the said Anton Schell will, during the remainder of the said term of five years, faithfully and truly perform his part of the within agreement, and that he will during the said extended period of three years be and continue the assistant of the said Albert Reindel in his art or profession of a photographic colourer or painter, and upon the same terms and conditions as are mentioned and contained in the within agreement, save so far as the same are hereby varied: And, lastly, it is hereby mutually agreed and declared by and between the said parties, *that they shall be respectively subject to the forfeiture of the sum of* 500*l.*, *to be paid to the other of them, his executors or administrators, as liquidated damages, in case or in the event of any breach being made *by either of them in the true performance of the terms and conditions of this agreement.* In [*109 witness, &c." Averment, that the respective sums of 500*l.* in the said first and second agreements respectively mentioned were and are penalties, and not liquidated damages; and that he the defendant was not, nor is,

liable to pay to the plaintiff the said sum of 500*l.* as and for liquidated damages, in manner and form as in the declaration alleged.

Fourth plea,—to the plaintiff's claim of 500*l.* as and for liquidated damages,—that the plaintiff, at the commencement of this suit, was and still is indebted to the defendant in an amount equal to the plaintiff's said claim, for money payable by the plaintiff to the defendant under and by virtue of the said agreements in the declaration respectively mentioned, as and for liquidated damages for and by reason of divers breaches of the said agreements respectively committed by the plaintiff,—and for the non-performance by the plaintiff of divers terms and conditions in the said agreements respectively contained on his part to be performed,—and for not continually supplying the defendant with photographic portraits or pictures to be retouched and perfected under the plaintiff's direction by the defendant in pursuance of the said agreements, and for neglecting and omitting so to do, contrary to the tenor and effect, true intent, and meaning of the said agreements respectively,—and for money found to be due from the plaintiff to the defendant on accounts stated between them; which amount the defendant was willing to set off against the plaintiff's said claim.

The plaintiff demurred to the third plea,—the grounds of demurrer stated in the margin being "that the third plea is bad in substance, upon the following grounds, amongst others, that is to say, that it is a plea to
*110] damages merely; that it admits all the breaches, and *that the plaintiff had a cause of action in respect of each and every of them sufficient to entitle him to nominal damages at all events; and that it is a plea to a mere conclusion of law deduced from the agreement set out in the declaration, which may be struck out as surplusage, and the declaration would if the same were struck out still show a good and sufficient cause of action in respect of which the jury might award any amount of damages within the limit of the sum claimed."

He also demurred to the fourth plea, except as to so much thereof as related to the account stated,—the grounds of demurrer stated in the margin, being "that it appears on the pleadings that the sum of 500*l.* mentioned in the agreement was not a subject of set-off."

The defendant joined in demurrer.

Phipson, in support of the demurrer.(*a*)—The 500*l.* mentioned in the two agreements, are clearly not liquidated damages, but a penalty; and the defendant was not justified by the plaintiff's introduction of an
*111] *allegation so idle into his declaration, in pleading to the damages in the way he has done. In Kemble *v.* Farren, 6 Bingh. 141 (E. C. L. R. vol. 19), 3 M. & P. 425, it was expressly held that liquidated

(*a*) The points marked for argument on the part of the plaintiff, were as follows:—

"That the third plea is a plea to damages merely; that it admits all the breaches alleged in the declaration, but shows no excuse for them; that, upon the said plea and declaration, it sufficiently appears that the plaintiff is entitled to recover some damages against the defendant in respect of every breach, and to have the same assessed by a jury; that the plea is pleaded to a mere conclusion of law adduced from the terms of the agreement set out in the declaration, which conclusion of law, if erroneous, may be struck out as surplusage, without prejudicing the plaintiff's right, as shown in the declaration, to recover any amount of damages, within the stipulated sum, for the breaches of agreement alleged in the declaration, and admitted by the plea; and that, for the reasons aforesaid, the plea is bad in substance."

And, as to the fourth plea, "that it sufficiently appears in the pleadings, that the sum of 500*l.* attempted to be set off, is not a subject of set-off, and that so much of the plea consequently is bad in substance."

damages cannot be reserved on an agreement containing various stipulations, of different degrees of importance, unless the instrument specifies the particular stipulation or stipulations to which the liquidated damages are to be confined. And that is confirmed by Galsworthy *v.* Strutt, 1 Exch. 659,† where Parke, B., says: "The rule is correctly laid down in Kemble *v.* Farren: and I said in the cases of Horner *v.* Flintoff, 9 M. & W. 678,† and Beckham *v.* Drake, 8 M. & W. 846,† that we were bound by that decision. In the more recent case of Green *v.* Price, 13 M. & W. 695,† I said, 'The principle is, that, although the parties may have used the term *liquidated damages*, yet, if the court can see, upon the whole of the instrument taken together, that there was no intention that the entire sum should be paid absolutely on non-performance of any of the stipulations of the deed, they will reject the words, and consider it as being in the nature of a penalty only!' And my Brother Alderson there said,—'But, where the damage is altogether uncertain, and yet a definite sum of money is expressly made payable in respect of it, by way of liquidated damages, those words must be read in their ordinary sense, and cannot be construed to import a penalty!' The law is correctly laid down in that case." The defendant had no right to plead to an immaterial averment: if he chooses to pick it out and plead idle pleas, he must abide the consequences. [WILLES, J., referred to Lush *v.* Russell, 4 Exch. 637,† 5 Exch. 203.† The plaintiff has been guilty of the first fault, by including in his declaration a breach which gives him no cause of action.] It is not a breach: it is a mere erroneous per quod,—or an erroneous inference of law. If the defendant found himself embarrassed by this claim, he *might have gone before a judge at Chambers to get it struck out. As to the distinction [*112 between a penalty and liquidated damages, see the authorities collected in the notes to Gainsford *v.* Griffith, 1 Wms. Saund. 58*b*, 58*c*.

John Gray (with whom was *W. R. Cole*), contrà.(*a*)—**Upon this declaration*, the 500*l.* must be treated as liquidated damages. [*113

(*a*) The points marked for argument on the part of the defendant, were as follows:—

"*As to the third plea*,—That the plea shows a good and sufficient answer to that part of the claim to which it is pleaded:

"That the declaration is so framed, that, if the plaintiff be not entitled to recover '500*l.* as and for liquidated damages,' he is not entitled to recover anything:

"That the plaintiff might have declared for general damages, but he has elected to sue for the forfeiture as and for liquidated damages; and the only breach alleged as a cause of action, is, the non-payment of such forfeiture,—Lowe *v.* Peers, 4 Burr. 2228; Hurst *v.* Hurst, 4 Exch. 571, 579:† That the plaintiff must recover, if at all, secundum allegata et probata: that under this declaration, he would be entitled to recover the whole 500*l.* or nothing,—Farrant *v.* Olmius, 3 B. & Ad. 692 (E. C. L. R. vol. 23); Fletcher *v.* Dyche, 2 T. R. 37; per Buller, J., in Astley *v.* Weldon, 2 Bos. & P. 353.

"That, if the plaintiff might claim liquidated damages and also general damages in the same count (which he has not done), it would be impossible for the defendant to plead to it, because almost any plea would be bad either as to the one claim or the other; and that if the plaintiff had newly assigned to the third plea, that he seeks to recover general damages, and not liquidated damages, that would have been a departure.*

"That the plaintiff is not entitled to recover the 500*l.* as and for liquidated damages, because the 500*l.* mentioned in the contract is in the nature of a penalty, and not liquidated damages,—Kemble *v.* Farren, 6 Bingh. 141 (E. C. L. R. vol. 19), 3 M. & P. 425; Beckham *v.* Drake, 8 M. & W. 835;† Galsworthy *v.* Strutt, 1 Exch. 666:† that it never could have been the intention of the parties that the plaintiff should actually pay the defendant 500*l.* as and for liquidated damages, if he neglected to pay him any one of the small sums mentioned in the table of prices

* Which, since the Common Law Procedure Act, 1852, is no ground of demurrer.

The plaintiff takes upon himself to state the effect of the agreement; and he has chosen to claim the 500*l.* as liquidated damages. Suppose there is an agreement with such a stipulation as this, so expressed as to make it clear that the penal sum is to be paid in the event of any one breach of the agreement,—how is the plaintiff to declare on it? He may set it out in terms, so that the court may see what it is. But he may also set out the effect of it. [WILLIAMS, J.—He cannot state the legal effect of it; but he may state what the language amounts to, at his peril. Is not the effect of your argument this, that the third plea amounts to a special plea of non assumpsit?] No doubt. In Hurst *v.* Hurst, 4 Exch. 571,† the declaration stated that the defendants covenanted that they "would not lop or top any tree without the consent in writing of the plaintiff, under a penalty of 20*l.* for each tree which should be so lopped or topped, over and above the actual value of the tree;" and alleged for breach that the defendants "lopped divers, to wit, twenty trees without the consent in writing of the plaintiff, which trees so lopped were of great value, to wit, of the value of 80*l.*, and thereupon and thereby the defendants then became liable to pay, and ought to have paid to the plaintiff, certain large sums of money, to wit, *114] the sum of 80*l.*, being the value of the *said trees, and also the further sum of 20*l.* for each of the trees so lopped by the defendants, being the amount of penalties then incurred and forfeited by the defendants to the plaintiff for lopping the said trees:" and it was held, that, assuming the 20*l.* penalty to be liquidated damage, the plaintiff could no trecover it on this breach, inasmuch as it did not allege that the penalty was not paid. That shows that the allegation that the defendant "has not paid the said 500*l.* or any part thereof," is not a mere conclusion of law, but a material averment. [WILLIAMS, J.—Put it as you will, the plea is nothing more than an informal non assumpsit. Mr. *Phipson* admits that the 500*l.* is a penalty, and that it is a misdescription of the agreement to say it is liquidated damages.] The distinction between a penalty and liquidated damages is well illustrated by the judgment in Lowe *v.* Peers, 4 Burr. 2225, 2228. [WILLIAMS, J.—The declaration introduces the agreement with the words, "it was witnessed."] It is not necessary to consider the effect of that: it is not so as to the part of the instrument in question; that commences with the words "and it was further mutually agreed," &c. [BYLES, J.—Does that mean anything more than that the agreement says so?] Lord Mansfield, in Lowe *v.* Peers, says: "There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole); or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, toties quoties. And upon this distinction they proceed in courts of equity. They will relieve against a penalty, upon a

contained in the contract: and that, if this were not clearly apparent on the face of the declaration (which suppresses the table of prices, &c.), it is rendered perfectly evident by the third plea, which sets out the contract verbatim:

"That the plaintiff is not entitled to recover."

*compensation; but, where the covenant is, 'to pay a particular liquidated sum,' a court of equity cannot make a new covenant for a man: nor is there any room for compensation or relief. As in leases containing a covenant against ploughing up meadow; if the covenant be 'not to plough,' and there be a *penalty*, a court of equity will *relieve against the penalty*, or will even go further than that (to preserve the substance of the agreement): but, if it is worded,—'to pay 5*l.* an acre for every acre ploughed up,'—there is no alternative, no room for any relief against it; no compensation: it is the substance of the agreement. Here, the specified sum of 1000*l.* is found in damages: it is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages." So, here, upon this declaration, the only damages a jury can give is 500*l.* The plaintiff having chosen to put this allegation into his declaration, and to allow it to come before the court on demurrer, is not at liberty now to turn round and say that the defendant has put in issue an immaterial allegation. [CROWDER, J.—You might have had it put right by going to a judge at Chambers.] Possibly: but our omission to adopt that course, does not absolve the court from the necessity of giving a legal judgment on the demurrer. Lush *v.* Russell, 4 Exch. 637,† applies to the fourth plea. There, the declaration stated an agreement whereby the defendant agreed to employ the plaintiff as a journeyman baker for four years, and to pay him certain weekly wages, and also certain additional sums in the three last years of the term; and alleged for breaches,—that the defendant, before the expiration of the term, wrongfully discharged the plaintiff from his employ,—that the defendant did not pay the plaintiff the weekly wages *for the remainder of the term,—and that the defendant did not pay the plaintiff the additional sums which he would have been entitled to if he had continued in the employ of the defendant. The defendant demurred generally to the last two breaches, and the plaintiff joined in demurrer: and the court held that the proper course was, to have applied to a judge to strike out those breaches, and that, upon this record, they could not be treated as surplusage. Parke, B., giving the judgment of the court, says: "We think that, on this record, we are bound to treat these averments as breaches; and, it being agreed on both sides that they are bad as breaches, our judgment must be for the defendant. The proper course was, to have applied to a judge at Chambers to strike them out of the declaration as surplusage; and, in the event of the party being dissatisfied with the opinion of the judge, application should have been made to the court. By demurring generally, and joining in demurrer, it must be taken that both parties considered them as distinct breaches; and, being bad as breaches, the plaintiff cannot have judgment for contingent damages." If the 500*l.* is to be treated as liquidated damages, the fourth plea is clearly good as a set-off. [*115] [*116]

Phipson was heard in reply.

WILLIAMS, J.—It is much to be regretted that the improvements introduced by the Common Law Procedure Acts have not added more to the lucidity of proceedings. We are called upon here to decide a mere point of pleading. It appears to me that both pleas are bad, as being in substance pleaded to damages, only I cannot admit the correctness of the view presented by Mr. *Gray*, that the stipulation in question

*117] must upon this declaration be taken to be liquidated *damages, and that the declaration is answered by the plea bringing before the court other parts of the agreement showing that the plaintiff is mistaken in supposing that the 500*l.* is payable as liquidated damages for any breach thereof. That being so, there is a question behind upon which the court are not quite unanimous, viz., whether or not the pleas are good as amounting to special pleas of non assumpsit. It has been strongly urged by Mr. *Gray* that this case should be governed by Lush *v.* Russell, 4 Exch. 637,† 5 Exch. 203.† There, the declaration contained two bad breaches and one good one: the defendant demurred to the former; and, the plaintiff having joined in demurrer, the court held that the defendant was entitled to judgment. I can see no distinction between that case and the case of a declaration containing one good count and two bad ones: if the defendant demurs to the two bad counts, and the plaintiff joins in demurrer, the former is entitled to judgment, no cause of action being disclosed. I do not understand the third plea as being a plea to one of several claims: but it appears to me that the plea is bad, as putting in issue matter which is no answer to the action or to any part of the action, but only goes to the measure of damages. The fourth plea is bad on the same ground. Upon the whole, I am of opinion that the plaintiff is entitled to judgment.

CROWDER, J.—I am of the same opinion. As to the argument, founded upon the declaration, that there is apparently on the face of it an allegation that the 500*l.* were to be paid as liquidated damages, it seems to me, that, looking fairly at the declaration, no such result follows. The pleader sets out the agreement, beginning "it was witnessed," &c. It is true that in the latter part the allegation is "And lastly it was thereby mutually agreed and declared," &c. But I think that *must be taken substantially to refer to that which is stated in the agreement. The same language is used with respect to the second breach; the intention being, to set out the agreement, and not to make that an averment of an absolute stipulation that 500*l.* should be paid for every breach of the agreement. Strong language is necessary to bring about such a result. That being so, the averment at the end of the declaration,—that "by reason of the said several premises, the defendant forfeited and became liable, under and by virtue of the agreements aforesaid, to pay to the plaintiff the said sum of 500*l.* as liquidated damages," is an immaterial averment, and the plaintiff might recover any portion of the 500*l.* which the jury might think proper to give. I agree with my Brother Williams in thinking that Lush *v.* Russell has no bearing upon this case. I cannot look at this allegation as a separate breach, but merely as a statement of damages.

*118]

WILLES, J.—I own I should have been better satisfied if the rest of the court had arrived at the conclusion that the judgment should be in favour of the defendant. The plaintiff undoubtedly describes the sum due to him as liquidated damages: he states that the events have happened on which, if the 500*l.* were liquidated damages, it would be payable, and that it has not been paid. That that is in form an averment that the money is due and payable as liquidated damages, no lawyer who had not read the case of Kemble *v.* Farren, 6 Bingh. 141 (E. C. L. R. vol. 19), 3 M. & P. 425, could for a moment doubt. But, speaking in legal language, there is a colourable breach of the agreement

in terms. If that be so, and if Lush *v.* Russell be good law, the defendant selecting a bad breach, and demurring, and the plaintiff joining in demurrer, the defendant would be entitled to judgment, because there would be nothing upon which the court *could give judgment for the plaintiff. I have always understood, that, where, if a pleading were demurred to, there would be judgment for the demurring party; and such party, instead of demurring, relies on the matter of fact, and it is found against him; or if there be a demurrer to a plea setting up the answer in fact, and a subsequent demurrer thereto, the other party may obtain judgment in respect of the insufficiency of the former pleading. I do not, therefore, see any substantial distinction between Lush *v.* Russell and the present case. For these reasons, I must confess I do not so clearly see my way to the conclusion at which the rest of the court have arrived, though I have not much reliance upon the correctness of my own opinion on the matter. [*119

BYLES, J.—I am of opinion that the plaintiff is entitled to judgment. It appears to me that the 500*l.* mentioned in the declaration is a penalty only, and that its non-payment constitutes no breach of any legal duty. The allegation at the end of the declaration is merely a legal consequence wrongly inferred. The pleas, therefore, are bad, as being pleaded to that which is an utterly immaterial allegation.

Judgment for the plaintiff.

As to where a stipulation for liquidated damages will be treated as a penalty, and what will be considered such: see American note to Peachy *v.* Somersett, 2 Lead. Cases in Equity 772.

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*STANSFELD and Others, Assignees of the Estate and Effects of THOMAS WHITE, the younger, a Bankrupt, *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PORTSMOUTH. *Feb.* 9. [*120

By a lease, the lessee covenanted to erect a steam-engine, machinery, and buildings proper for carrying on the business of a shipwright, on the land demised, and to leave the same for the lessors at the expiration or other sooner determination of the term,—"it being by the said indenture declared that all steam and other engines, machinery, &c., set up upon the premises at any time during the term for the purpose of carrying on the trade of a shipwright, together with all fixtures, should not be removed therefrom, but should, upon the expiration or other sooner determination of the said term, belong to the landlords and not to the tenant, without any payment being made to him for the same." The lease then went on to provide "that the last-mentioned stipulation should not be construed to apply to any machinery or other articles which might be erected or set up on the demised premises by the lessee during the term, for any other purpose than that of carrying on the business of a shipwright; but that it should be lawful for the lessee at any time during the term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, &c., from the said demised premises." The lease then contained a further proviso, that, in the event of the lessee becoming bankrupt, it should be lawful for the lessors to re-enter, "and upon such entry to take possession of, have, &c., as their own property, without paying anything for the same, all steam and other engines, &c., which should be found on the premises, and which should be used or employed in or about the business of a ship-builder thereon." The lessee having become bankrupt, the lessors re-entered for the forfeiture:—Held, that the assignees of the lessee were entitled to enter for the purpose of removing the fixtures other than those set up for the ship-building business, and to a reasonable time for that purpose.

THE first count of the declaration stated that the said Thomas White the younger, before he became bankrupt, under and by virtue of a certain indenture of lease, bearing date the 21st of December, 1855, became and was tenant to the defendants of a certain building and repairing-slip and ground, with the appurtenances thereto belonging, situate at Portsmouth, in the said indenture particularly described; and it was in and by the said indenture of lease, among other things, covenanted and agreed by the said Thomas White the younger, that he should or would, on or before the 25th of March then next, provide, set up, and erect a good and sufficient steam-engine or other sufficient apparatus, moving carriage, and all necessary machinery and building for the proper carrying on the business of a shipwright on the said slip, ground, and premises demised, to the satisfaction of the defendants, and the said slip, way, ground, buildings, erections, and engines, machinery, tackle, *121] gear, and premises demised, or which *should be set up by the said Thomas White the younger during the said term, with their and every of their appurtenances, should and would peaceably and quietly leave, surrender, and yield up to the said defendants at the end, expiration, or other sooner determination of the said term,—it being by the said indenture declared that all steam and other engines, machinery, tackle, gear, and utensils, set up upon the premises at any time during the said term for the purpose of carrying on the trade of a shipwright, together with all fixtures, should not be removed therefrom, but should, upon the expiration or other sooner determination of the said term, belong to the landlords, and not to the tenant, without any payment being made to him for the same: provided, nevertheless, that the last-mentioned stipulation should not be construed to apply to any machinery, tackle, gear, utensils, or other articles which should or might be erected or set up on the said demised premises by the said Thomas White the younger during the said term for any other purpose than that of carrying on the said business of shipwright; but that it should and might be lawful for the said Thomas White the younger at any time during the said term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, gear, utensils, or other articles, from the said demised premises: and it was further provided, that, if the said Thomas White the younger should become bankrupt, then that it should be lawful for the said Mayor, &c., in and upon the said slip, way, ground, erections, buildings, and premises demised, or any part thereof in the name of the whole, to re-enter, and the same thenceforth to have again, re-possess, and enjoy as in their former estate and condition; and also upon any such entry to take possession of, have, hold, and enjoy as their own property, without paying anything for the same, all steam *122] *and other engines, machinery, utensils, tackle, gear, matters, and things whatsoever which should be found on the said premises, and which should be used or employed in or about the business of a ship-builder, in connection with the said slip, way, and premises demised: Averment, that, whilst the said Thomas White the younger so held the said demised premises as tenant thereof to the defendants, he erected, set up, and fixed in and upon the demised premises certain machinery, tackle, gear, utensils, and other articles, for purposes other than that of carrying on the said business of a shipwright, the same being fixed and fastened in and upon the said premises in such a manner

that the same might and could be separated and removed without causing or doing any material damage or injury to the said demised premises; and that the said machinery, tackle, gear, utensils, and other articles always were used by the said Thomas White the younger for purposes of trade other than for the business of a shipwright: That, during the continuance of the said term, the said Thomas White the younger became bankrupt, and thereupon all the estate and effects, right, title, and interest whatsoever of the said bankrupt came to and of right belonged to the plaintiffs, as assignees as aforesaid; and that thereupon the plaintiffs, as such assignees as aforesaid, entered upon and took possession of the said demised premises, and of the said machinery, tackle, gear, utensils, and other articles in and upon the said premises: That afterwards, and whilst they continued in possession and occupation of the said demised premises as assignees as aforesaid, for the purpose of realizing the estate and effects of the said bankrupt, and before the expiration of a reasonable time for the separation and removal of the said machinery, tackle, gear, utensils, and other articles from the said premises, the defendants entered upon the said premises; and thereupon, whilst the plaintiffs continued in the possession *and occupation [*123 of the said premises for the purpose of realizing the estate and effects of the said bankrupt; and, although the plaintiffs would, within a reasonable and proper time in that behalf, have separated and removed from and off the said demised premises the said machinery, tackle, gear, utensils, and other articles, had the defendants suffered or permitted them so to do, the defendants then wholly refused to permit the plaintiffs then or at any time to separate or remove the same, and then, before a reasonable time for the separation or removal of the same had elapsed, wrongfully prevented and hindered the plaintiffs from separating and removing the said machinery, tackle, gear, utensils, and other articles from the said premises, and thence continually hitherto have prevented and hindered the plaintiffs from so doing, and the defendants have used and converted the same to their own use.

The defendants demurred to the first count,—the ground of demurrer stated in the margin being, "that it shows no right in the plaintiffs to trespass on the defendants' premises for the alleged purpose, nor any obligation on the defendants to permit the plaintiffs so to do." Joinder.

Coleridge (with whom was *Kinglake*, Serjt.), in support of the demurrer.(a)—[WILLES, J.—There is no *allegation in the declaration of notice to the tenant that the defendants were going into [*124

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the rights of the late tenant or his assignees to remove fixtures no longer exists after the landlord's entry, upon a forfeiture of the term.

"2. That, after the entry of the landlords for a forfeiture, the possession of the late tenant or his assignee was wrongful, and that such possession could give no right to him or them to remove the fixtures.

"3. That the prevention of the landlords of the removal of fixtures after the entry for a forfeiture, can give no right of action to the late tenant or his assignees, in the absence of any express contract on the part of the landlords to allow such removal after the determination of the term.

"4. That the property in fixtures, as fixtures, is always in the landlord, subject to the tenant's right to remove them during the term.

"5. That the law allows to the late tenant no time after the expiration of the tenancy for removal of fixtures, and that a right to remove them after the expiration of the tenancy can be granted only by deed."

the land for the purpose of taking the fixtures. I do not see how the action could be maintainable without such notice. That should be inserted. *Hannen*, for the plaintiff, assented to the proposed amendment.] The declaration discloses no cause of action. It avers that the articles in question were used by the bankrupt for purposes of trade otherwise than for the business of a shipwright. Being unsevered from the freehold, they would not pass to the assignees as goods and chattels. The general rule of law is, that fixtures, unless removed during the term, or, at all events, during the period of the tenant's actual possession of the premises under a claim of right, become the property of the landlord: Penton *v.* Robart, 2 East 88, 4 Esp. N. P. C. 33; Mackintosh *v.* Trotter, 3 M. & W. 184;† Weeton *v.* Woodcock, 7 M. & W. 14;† Heap *v.* Barton, 12 C. B. 274 (E. C. L. R. vol. 74); Roffey *v.* Henderson, 17 Q. B. 574 (E. C. L. R. vol. 79); 2 Smith's Leading Cases, 4th edit. 159, 160. Here, the possession of the tenant, and of the assignees, was determined by the re-entry of the lessors. The rule is the same where the term is determined by an act over which the tenant has control, as by a forfeiture: Minshall *v.* Lloyd, 2 M. & W. 450;† Storer *v.* Hunter, 3 B. & C. 368 (E. C. L. R. vol. 10), 5 D. & R. 340 (E. C. L. R. vol. 16); Amos on Fixtures, 2d edit. 103. Where a term has determined by the lessee's own act, it has been held that he is not entitled to emblements: Davis *v.* Eyton, 7 Bingh. 154 (E. C. L. R. vol. 20), 4 M. & P. 820. That shows the *principle which ought to guide the court in the decision of this case. In Heap *v.* Barton, 12 C. B. 278 (E. C. L. R. vol. 74), Jervis, C. J., suggests that fixtures annexed to the freehold become by the act of annexation the property of the landlord, subject to the tenant's right to remove them during the term. In Bishop *v.* Elliott, 11 Exch. 113,† by indenture, C. demised to E. an unfinished messuage for the term of ninety-seven years: the indenture contained a covenant by E., that, at the expiration of the term, he would deliver up the demised premises unto C., "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs, *and other fixtures and articles in the nature of fixtures*, which shall, at any time during the said term, be fixed or fastened to the said demised premises, or be thereto belonging:" E. took possession of and completed the messuage, and fitted it up with things necessary for carrying on the business of a tavern-keeper and licensed victualler, and for that purpose put in the premises certain fixtures of the description called and known as trade and tenant's fixtures: B. afterwards contracted with E. to purchase from him an underlease of the premises, and the good-will, and also the furniture, fixtures, stock in trade, &c., at a valuation: in pursuance of this agreement, E. executed to B. an underlease, which contained a covenant on the part of the defendant in the same words as the above covenant by E. in *his* lease: and it was held by the Exchequer Chamber that the covenant above set forth did not restrain B., the lessee, from disposing either of the tenant's or of the trade fixtures. In delivering the judgment of the court, Parke, B., there says: "It may be, that, by so construing the covenant, we reduce its operation to that merely which the general rule of law would have given the landlord without it. But this is an argument of little weight. No modern lease probably will be found which does not contain *covenants merely to secure rights subsisting at common law, but perhaps more easily enforced by the

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help of an express contract. These particular words may have been introduced for greater caution, because of the language of some of the decisions quoted, or to bring an infringement of the right within the clause of re-entry." [WILLES, J.—The question here depends upon the construction of the contract into which the parties have entered.] The true construction of the contract, it is submitted, is this, that, as to all but the fixtures applicable to the ship-building trade, the common-law rights of the parties are to prevail, but that those which are put up for that purpose shall be the property of the lessors. The covenant imposes a limitation on the tenant's rights, but leaves the landlord's rights untouched. The proviso that that stipulation should not be construed to apply to any machinery, &c., erected by the tenant during the term for any other purpose than that of carrying on the business of a shipwright, was merely introduced for the purpose of clearing up any doubt which might exist as to the tenant's liability to leave *all* fixtures he might erect upon the premises at the expiration of the term. [WILLIAMS, J.—The proviso goes on,—"but that it should and might be lawful for the said T. White, at any time during the said term,' or at the expiration thereof, to remove and take away all such last-mentioned machinery, &c., from the said demised premises."] That is merely an affirmance of the common-law right of the tenant.

Hannen, contrà.(*a*)—There are two questions for the *consideration of the court in this case,—first, whether the assignees [*127 of White had not a reasonable time for the removal of these fixtures after the determination of the term,—secondly, whether there is anything in the terms of the lease to lessen or control that right. 1. The first point has been distinctly raised in two cases,—In Weeton *v.* Woodcock, 7 M. & W. 14,† where, however, it became unnecessary to determine it,—and in Heap *v.* Barton, 12 C. B. 274 (E. C. L. R. vol. 74), which turned on the special agreement of the parties. In the last-mentioned case, Jervis, C. J., says: "The courts seem to have taken three separate views of the rule,—first, that fixtures go, at the expiration of the term, to the landlord, unless the tenant has during the term exercised his right to remove them,—secondly, as in Penton *v.* Robart, 2 East 88, that the tenant may remove the fixtures notwithstanding the term has expired, if he remains in possession of the premises,—thirdly, that his right to remove fixtures after his term has expired is subject to this further qualification, viz., that the tenant continues to hold the premises under a right still to consider himself as tenant." The second of these propositions, it is submitted, is the correct one. The third is supported only by a dictum of Alderson, B., in Weeton *v.* Woodcock, which is based upon something thrown out by Parke, B., in Minshall *v.* Lloyd, 2 M. & W. 460.† It may be convenient to see what was the *state [*128 of the authorities when Minshall *v.* Lloyd came to be decided,— all of which will be found referred to in the notes to Elwes *v.* Maw,

(*a*) The points marked for argument on the part of the plaintiffs, were as follows:—

"That the declaration discloses a good cause of action; that it does not appear that the term was determined, so as to deprive the assignees of the right, while they continued in occupation of the premises, to remove machinery not erected for the use of the business of a shipwright; that the plaintiffs were entitled to a reasonable time after the bankruptcy to remove all articles in the nature of fixtures to which the bankrupt was entitled; and that, by the terms of the lease, the defendant did not, upon the bankruptcy of the tenant, acquire any right to the machinery, &c., erected for purposes other than that of carrying on the business of a shipwright."

2 Smith's Leading Cases, 4th edit. p. 144, beginning with the Year Book, 20 H. 7, fo. 13. In all the earlier authorities, the right of removal is expressly limited to the actual legal tenancy. [WILLIAMS, J.—Surely it is now settled that the right of the tenant to remove fixtures exists during the period during which he might be considered as tenant.] In Poole's Case, 1 Salk. 368, Lord Holt says, "that, *during the term*, the soap-boiler might well remove the fats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom) in favour of trade, and to encourage industry; but, *after the term, they become a gift in law to him in reversion*, and are not removable." In Penton *v.* Robart, 2 East 88, Lord Kenyon says: "The old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier: but in modern times the leaning has always been the other way, in favour of the tenant, in support of the interests of trade, which is become the pillar of the state. And some of the cases have even gone further in favour of the executor of tenant for life against the remainder-man, between whom the rule has been holden stricter; for, it has been determined that the executor or tenant for life was entitled to take away the fire-engine of a colliery." Elwes *v.* Maw, 3 East 38, turned entirely upon the question whether an agricultural tenant was entitled to the same privileges in this respect as a trader; and Lord Ellenborough, in a very elaborate judgment, held that he was not. So, in Lee *v.* Risdon, 7 Taunt. 188, 2 Marsh. 495, (E. C. L. R. vol. 4), speaking of fixtures which a tenant might lawfully remove, Gibbs, C. J., says, that, "unless the lessee uses *during the term* *129] his continuing privilege to sever *them, he cannot afterwards do it." And that doctrine received the assent of Abbott, C. J., in Colegrave *v.* Dias Santos, 2 B. & C. 76 (E. C. L. R. vol. 9), 3 D. & R. 255 (E. C. L. R. vol. 16). The observations of Bayley, J., in Storer *v.* Hunter, 3 B. & C. 368 (E. C. L. R. vol. 10), 5 D. & R. 240 (E. C. L. R. vol. 16), also strongly corroborate this view: and there the term was determined, as here, by a forfeiture. Lord Tenterden, in Lyde *v.* Russell, 1 B. & Ad. 394 (E. C. L. R. vol. 20), limits the right in the same way. In Minshall *v.* Lloyd, 2 M. & W. 450,† Parke, B., says, in like manner, that "the right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures." And in Macintosh *v.* Trotter, 3 M. & W. 184,† the same learned judge says: "Minshall *v.* Lloyd is a direct authority on this point. I gave my opinion in that case, not on my mere impression at the time, but after much consideration of this point,—that the principle of law is, that whatsoever is planted in the soil belongs to the soil; quicquid plantatur solo, solo cedit; that the tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered as an excrescence on the term; but that they are not goods and chattels at all, but parcel of the freehold, and as such not recoverable in trover. That case is a direct authority, so far as my opinion and that of my Brother Alderson go; and I think it was a correct decision." That, however, still leaves it doubtful what that excrescence is. The true rule probably is this, that the tenant's right of removal continues whilst he remains in possession of the premises in continuation (whether rightfully or otherwise) of the same holding under the lessor. [WILLIAMS, J.—Who was in possession at the time

the cause of action arose?] The assignees. [WILLIAMS, J.—No. The lessors had re-entered for the forfeiture, and they were in possession. WILLES, J.—It would seem that *both* were in possession. *If two are in possession at the same time, the law, according to Lord Coke, "*accords* the possession to him who has title." CROWDER, J.—The assignees claim no title to the land.] It is submitted that the proper limitation of the tenant's right of removal exists only whilst he or his representatives continue in possession, without any determination of the tenancy, either actual or constructive. The fair construction of the lease is, that the tenant shall have a reasonable time to remove the fixtures other than shipwrights' fixtures (which by the contract were to be left) on the determination of his term. The contrary construction would be giving no effect whatever to the latter part of the covenant. [*130

Coleridge, in reply.—The true principle is involved in the three propositions thrown out by Jervis, C. J., in Heap *v.* Barton, 12 C. B. 274 (E. C. L. R. vol. 74),—"First, that fixtures go, at the expiration of the term, to the landlord, unless the tenant has during the term exercised his right to remove them,—Secondly, that the tenant may remove the fixtures notwithstanding the term has expired, if he remains in possession of the premises,—Thirdly, that his right to remove fixtures after his term has expired is subject to this further qualification, viz., that the tenant continues to hold the premises under a right still to consider himself as tenant." Fixtures annexed to the freehold are primâ facie the property of the owner of the soil. In aid of the tenant, and in favour of trade, an exception is engrafted upon that rule, enabling him to sever the fixtures, and so regain his property in them: if he does not avail himself of that right, the fixtures belong to the person to whom the freehold belongs. The law being so, the exceptions are equally clear and simple. Whichever be the rule adopted in the present case, the defendants' right must *prevail. The lease has expired, the lessors have entered, and the fixtures are theirs. Then, except for the limited purpose of realizing the bankrupt's effects, the assignees have nothing to do with the occupation of the premises: and, even if they had, the term being ended, the re-entry of the lessors was a re-vesting of the freehold in them, with all the rights belonging to it. And, as to the third rule,—whatever be its meaning,—after the re-entry of the lessors, the assignees could have no right to consider themselves as tenants. When a lessor re-enters lawfully, he enters upon the full and indisputable possession of that which, subject to the privilege of the tenant, has been his property during the whole of the term. [WILLIAMS, J.—The re-entry of the lessor can make no difference, if the tenant has by law a reasonable time for the exercise of his right of removal.] Then, as to the covenant,—the language is very peculiar: "it shall and may be lawful for the said Thomas White, *at any time during the said term*, or, *at the expiration thereof*, to remove," &c. That clearly does not entitle him to remove the fixtures *after* his term has expired. [*131

WILLIAMS, J.—I am of opinion that the plaintiffs are entitled to judgment. A number of questions of no little difficulty have been raised in the course of the argument, as to the right of a tenant to remove fixtures at the determination of his term, and as to the period of time when he must exercise his right to disannex them from the freehold. A good deal of discussion has also taken place as to the effect of a determination of the

term by the act of the tenant himself,—whether he puts himself in a different position as to his right of removal where the tenancy has been determined by a forfeiture. But, in the view we take, it becomes un-
*132] necessary to determine any of these points, *because it appears that the parties have themselves provided what shall be their respective rights upon the happening of such a state of things as has arisen. It appears that White, the bankrupt, became tenant of the premises under the corporation of Portsmouth under a lease whereby he covenanted to set up a steam-engine and machinery and buildings for the proper carrying on the business of a shipwright on the slip, ground, and premises, demised, "and the said slip-way, ground, buildings, erections, and engines, machinery, tackle, gear, and premises demised, or which should be set up by the tenant during the term, with their and every of their appurtenances, should and would peaceably and quietly leave, surrender, and yield up to the defendants (the lessors) at the end, expiration, or other sooner determination of the said term,—it being by the said indenture declared that all steam and other engines, machinery, tackle, gear, and utensils set up upon the premises at any time during the said term for the purpose of carrying on the trade of a shipwright, together with all fixtures, should not be removed therefrom, but should, upon the expiration or other sooner determination of the said term, belong to the landlord, and not to the tenant, without any payment being made to him for the same." Then follows a proviso, "that the last-mentioned stipulation should not be construed to apply to any machinery, &c., which should or might be erected or set up on the demised premises by White during the term for any other purpose than that of carrying on the said business of a shipwright; but that it should and might be lawful for White at any time during the term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, &c., from the said demised premises." Stopping here, a controversy is
*133] raised as to the meaning of this stipulation. On the *one hand, it is insisted that it means to express no more than the common law would imply, viz., that the tenant is to have the right to remove the last-mentioned fixtures, provided he exercises that right during the term or at the end of it. But it seems to me that this proviso must be read in conjunction with that which immediately follows it, manifesting that the parties are contemplating the very state of things which has arisen,—that, if the lessee shall become bankrupt, it shall be lawful for the lessors to re-enter, and upon such re-entry to take possession of and enjoy as their own property, without paying anything for the same, all steam and other engines, machinery, &c., which should be used or employed in or about the business of a ship-builder. Surely it is impossible to doubt, that, when the parties have stipulated that the lessors shall have this right, it must be understood that they intended the right to be confined to the fixtures stipulated for, and not to apply to the others. It comes, then, to this, that the lessors are at the expiration or other sooner determination of the term to take the ship-building fixtures, and the tenant is to have the others; and, if so, it follows that the latter is to have a reasonable time for their removal. This right, then, being in the tenant, or his assignees, the declaration avers that they have exercised it within a reasonable time. On the face of the lease, a distinction is made between the two sets of fixtures; it being in effect stipulated that

the one set shall go to the lessors, and the other to the lessee; and, the declaration averring that the assignees of the latter were prevented from exercising their right to sever and remove them within a reasonable time after the lessors' re-entry for the forfeiture, the plaintiffs are entitled to the judgment of the court.

CROWDER, J.—I also am of opinion that the plaintiffs *are entitled to judgment; and I ground my opinion entirely upon the [*134 language of the lease, and consequently it is unnecessary to enter upon the consideration of the somewhat nice and difficult questions to which our attention has been directed in the course of the argument. The lease makes a clear distinction between the two sets of fixtures: as to the ship-builders' fixtures, there is an absolute prohibition against the tenants' removing them during the term, and an express stipulation that at its expiration they shall belong to the lessors: but, as to any other fixtures which may be set up on the premises during the term, there is this express proviso,—"provided nevertheless, that the last-mentioned stipulation shall not be construed to apply to any machinery, tackle, gear, &c., which shall or may be erected or set up on the said demised premises by the lessee during the said term for any other purpose than that of carrying on the said business of a shipwright; but that it shall and may be lawful for the lessee at any time during the said term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, &c., from the said demised premises." It is insisted, on the part of the defendants, that this gives the lessee no larger or more extensive right than the common law already gave him. But that proviso, as it seems to me, must be read in conjunction with the important one which follows it, and which stipulates, that, in the event of the bankruptcy of the lessee, the lessors shall have power to re-enter upon the demised premises, and to possess themselves of the fixtures erected for the purpose of the business of a ship-builder. Looking at the whole instrument, it appears to me that the lessors have no title to the fixtures erected for purposes other than the business of a shipwright; that the lessee is entitled to these; and that he is to have a reasonable time for removing them. No effect could *by any other construction be [*135 given to the language of the provisoes. And, the declaration averring that the re-entry of the lessors took place before the lapse of a reasonable time, it seems to me that a good cause of action is disclosed.

WILLES, J.—I am of the same opinion. The true construction of the lease is, that, in case of the bankruptcy of the lessee, the lessors may re-enter and take the ship-building fixtures, but no others. That being so, the assignees had a right to enter to take the others, and had a reasonable time for the exercise of that right.

BYLES, J., had gone to Chambers.

Judgment for the plaintiffs.(a)

(a) See Leader v. Homewood, post, T. Vac. 1858, and The London and Westminster Loan and Discount Company v. Drake, post, Vol. V.

The right of a tenant to remove fixtures erected or annexed by him to the freehold is one which must be exercised during the term, and ceases at its expiration; for after that time they are, in the language of some of the cases,

to be presumed to have been abandoned to the landlord: Gaffield *v.* Hapgood, 17 Pick. 192; Preston *v.* Briggs, 16 Verm. 129; Stockwell *v.* Marks, 5 Shepley 455; King *v.* Wilcomb, 7 Barb. 266; Byers *v.* St. John, 16 Conn. 322; Beckwith *v.* Boyce, 9 Missouri 560; M'Cracken *v.* Hall, 7 Porter Ind. 30; State *v.* Elliott, 11 New Hamp. 540; White *v.* Arndt, 1 Whart. 91; Overton *v.* Williston, 31 Penn. St. 158; and the rule applies with even greater stringency to a lease made by a tenant for life, which is terminated by his death; for there, though the case is still harder for the lessee, the remainder-man is under no contract: White *v.* Arndt, 1 Whart. 91. As a consequence of this doctrine it follows moreover that, where the tenant does not avail himself of his right during the term, it will not be revived by the subsequent execution of another lease: Shepard *v.* Spaulding, 4 Metc. 416. In Holmes *v.* Tremper, 20 Johns. 29, and Pemberton *v.* King, 2 Devereux 376, however, it was held that the right of the tenant to the fixtures as chattels, remains after the term, so that though if he re-enter to remove them he is liable to an action of trespass, the damage will be confined to the actual entry, and will not be allowed for the removal. But this is contrary not only to principle, but to the weight of authority on the very point, it being even held that the landlord may follow and retake the former fixtures, if he use no unnecessary violence, and that, at any rate, trover will lie against the tenant: Gaffield *v.* Hapgood, 17 Pick. 192; Preston *v.* Briggs, 16 Verm. 129; Stockwell *v.* Marks, 5 Shepley 455; State *v.* Elliott, 11 New Hamp. 540; Overton *v.* Williston, 31 Penn. St. 158.

If the tenant remains in possession after the termination of the lease, however, the presumption of abandonment does not arise, and he will still be entitled to remove his fixtures before his actual departure from the demised premises: Dubois *v.* Kelly, 10 Barb. 496; Mason *v.* Fenn, 13 Illinois 529; and in the latter case it was held that where in such a case the landlord obtained an injunction to restrain the tenant from removing the fixtures, and the injunction was afterwards dissolved on this ground, the tenant, though not then in possession, was entitled to re-enter and remove his fixtures. The presumption of abandonment is also inapplicable where by the lease the property in the fixtures and the right to remove is reserved by the tenant by an agreement in writing or otherwise: M'Cracken *v.* Hall, 7 Porter Ind. 30; and in such case the agreement overrides and supersedes the general rule of law on the subject, and the remedy of the landlord for the removal, where improperly made, must be in the agreement and not in an action of waste: Wall *v.* Hinds, 4 Gray 273. A special exception on the same ground to the rule has also been held to exist where land has been let for the purpose of a nursery of trees, in the absence of any express agreement as to the duration of the term: King *v.* Wilcomb, 7 Barb. 266. And in general the doctrine does not apply to such things as though connected with the freehold are not in law fixtures, as the gas fittings and stools of a store: Lawrence *v.* Kemp, 1 Duer 365.

That the tenant, in ordinary cases, would have a reasonable time for the removal of his fixtures, after the expiration of the term, at least where it was of uncertain duration, seems to be admitted in Preston *v.* Briggs, 16 Verm. 129; but this, though perhaps founded in substantial justice, is not in accordance with the American authorities.

In the matter of the Complaint of RANSOME and Another against THE EASTERN COUNTIES RAILWAY COMPANY. *Feb.* 25.

A railway company established a system of carrying coals according to assigned districts, comprising certain places on their lines and branches, carrying them within those several districts at certain lower rates for quantities not less than a "train-load" of 200 tons. The complainants, who were coal-dealers at Ipswich, also carried on that business at N., S., E., T., and B., which are places on that branch of the company's lines which conducts to Peterborough, and also at M. and D., which are on another branch line communicating with that first mentioned, and also at H., which is on another distinct branch. These districts were so adjusted that the places where the complainants deal were distributed into three of them, so that, in order to take advantage of the reduced rates, the complainants would have to send from Ipswich three full "train-loads," which was a larger quantity than they could profitably send to those districts; and thus they sustained great injury: whereas, the rival dealers at Peterborough, by reason of one of the assigned districts embracing *seven* of those places at which the complainants dealt, were enabled to send their coals in such quantities as to avail themselves of the reduction. It being sworn, on the part of the company, that these districts were adjusted, not with a view to give an undue preference to the one set of dealers over the other, but solely with regard to their own convenience, and the wants of the neighbourhood:—Held, that the complaint was not sustained.

The company made a scale of charges for the carriage of coals from Peterborough and Ipswich respectively to various places, the effect of which was to diminish the natural advantages which the Ipswich dealers possessed over those of Peterborough, from their greater proximity to those places, by annihilating (in point of expense of carriage) in favour of the latter a certain portion of the distance between Peterborough and those places:—Held, an undue preference to the Peterborough dealers over those of Ipswich.

The court refused to grant an attachment against a railway company for disobedience to a writ of injunction under the 17 & 18 Vict. c. 31, enjoining them to desist from giving an undue preference, in respect of the carriage of coals, to persons carrying coals from P. or other places to or towards certain places mentioned in the rule,—the affidavits on the part of the company showing a bonâ fide endeavour on their part to conform to the order of the court,—although it appeared that the reformed scale of charges still operated in some other respects injuriously to the interests of the complainants, and advantageously to the other parties.

T. JONES, in Michaelmas Term last, obtained a rule calling upon the Eastern Counties Railway Company to show cause why a writ of injunction should not issue *against them pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining the said company "to desist from giving an undue preference in respect of the carriage of coals on the railways of the said company to persons trafficking in coals and sending them by the said railways from Peterborough and other places to or towards Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, or any of them, and from subjecting the complainants to any undue prejudice in respect of the carriage of coals from Ipswich to or towards the said places, or any of them; and enjoining the said company to carry coals for the complainants from Ipswich to or towards the said places and every of them on equal terms with persons trafficking in coals and sending them by the said railways from Peterborough and other places to or towards the said places or any of them,—having due regard to the circumstances, if any, which render the cost to the said company of carrying for the one party less than the cost of carrying for the other." [*136

The material parts of the affidavit upon which the rule was obtained, were as follows:—

1. The complainants are dealers in coal at Ipswich and at Needham Market, at Stowmarket, at Elmswell, at Thurston, at Bury St. Edmunds, at Hadleigh, at Mellis, and at Diss.

2. The Eastern Counties Railway Company are in possession of and work and have the management and *control of certain railways
*137] forming a main line of railway commencing at London and running thence to and past Ipswich, Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Newmarket, Cambridge, and Ely, and running thence to Peterborough, where it joins the Great Northern Railway; and the company are also in possession of and work and have the management and control of two branch lines of railway, one of such branch lines being a branch line running from the said main line from a point south of Ipswich to Hadleigh, and the other of such branch lines being a line running from the said main line at Haughley, near Stowmarket, to and past Mellis and Diss.

3. The coal in which the complainants trade is brought by sea to Ipswich, and is delivered to them at Ipswich, and by them sold to their customers at the several places at which they so deal; and it is also sent by them to those places to be sold to their customers there; and the only mode by which they are able to convey such coal from Ipswich to those several places is by the main line and branch lines respectively belonging to the company.

4. The company are desirous of preventing the complainants from dealing at the several places at which they so deal, and are desirous of excluding from the several places at which the complainants so deal in coal all such seaborne coal, and of suppressing and destroying the trade in seaborne coal at several places at which the complainants so deal in coal as aforesaid.

5. Certain traders in coal residing and carrying on business for the most part at Peterborough, or at places to the north and north-west of Peterborough, trade at the places at which the complainants so deal in coal, in a similar description of coal brought from the north of England by the Great Northern Railway from Peterborough, and also in another kind of coal brought from *the counties of Derby and York by
*138] the Midland Railway to Peterborough.

6. The company have given and do give undue and unreasonable preferences and advantages in the carriage of such landborne coal on their railway to and in favour of such dealers in landborne coal, and to and in favour of the traffic in landborne coal, at such places, and subject the complainants and other traders in seaborne coal at the said places in which the complainants deal in coal as aforesaid, and the trade in seaborne coal at such places, to undue and unreasonable prejudice and disadvantage, in the carriage of such seaborne coal.

7. The company do not carry coals for the complainants and for other merchants residing at Ipswich and dealing in seaborne coal as aforesaid, on equal terms with such dealers in landborne coal, although there are no circumstances to justify such irregularity.

8. The company having on and previous to the 29th of January, 1857, given an undue preference to Messrs. E. & A. Prior, who were then dealers in landborne coal, and carrying on business at Peterborough, and dealing in landborne coal at the places at which the complainants so deal in seaborne coal as aforesaid, for and in respect of the carriage of coals on the main line of their railway, a rule was pronounced by this court on the 29th of January, 1857, at the instance of the complainants, whereby it was ordered that a writ of injunction should issue

enjoining the company thenceforth altogether absolutely to desist from giving an undue preference to the said Messrs. E. & A. Prior for or in respect of the carriage of coals on their railways, and enjoining and commanding them thenceforth to carry coals for the complainants on equal terms with the said Messrs. E. & A. Prior, having due regard to the circumstances, if any, which rendered the cost to the *company of carrying for the one party less than the cost of carrying for the other party; which said writ of injunction was afterwards duly issued and served on the secretary and directors of the company. [*139

9. In February, 1857, a correspondence took place between the attorneys of the complainants and of the company, in which the former complained of being still charged the same rates as before the rule, and which ended with a letter of the 1st of May, in which the latter wrote,—"The company consider the rates now charged are in strict accordance with the rules laid down by the court." (*a*)

10. At the time the former motion was made, the charges made to the Messrs. Prior were made under an agreement which was put an end to before the date of the last-mentioned letter.

11. On the 1st of May, 1857, the company issued new regulations for the conveyance of coal, and a new scale of rates. The paper marked A. contains the regulations and rates of the company for the carriage of coal *from Peterborough* under the circumstances therein expressed.

12. The paper marked B. contains the regulations and rates of the company for the carriage of coal *from Ipswich*, under the circumstances therein expressed.

13. The dealers in landborne coal have been charged, since the 1st of May, 1857, under the circumstances and conditions therein expressed, according to the paper marked A., or at lower rates.

14. The district numbered 8 in the printed paper marked A., includes Ipswich, Needham Market, Stowmarket, Elmswell, Thurston, Mellis, and Hadleigh, being *seven* of the principal places at which the complainants deal in coals.

*15. The district numbered 1 in the printed paper marked B., includes only (exclusive of Wisbeach) *three* of such principal places at which the complainants deal, viz., Needham Market, Stowmarket, and Mellis. [*140

16. The district numbered 2 in the said printed paper marked B. includes only *two* of such principal places at which the complainants deal, viz., Elmswell and Thurston.

17. The district numbered 3 in the said paper marked B. includes none of the principal places at which the complainants deal, except Hadleigh.

18. The district numbered 4 in the said paper marked B. includes none of the principal places at which the complainants deal.

19. The effect of this adjustment of the districts mentioned in the papers marked A. and B. respectively, and of the regulations and rates mentioned therein respectively, is, that, in order to enable the complainants to supply all their customers at Thurston, Elmswell, Mellis, Stowmarket, Needham Market, and Hadleigh, at the lower rates mentioned in the paper marked B., it is necessary for them to send from Ipswich

(*a*) See Re Ransome and The Eastern Counties Railway Company, 1 C. B. (N. S.) 437 (E. C. L. R. vol. 87).

three train-loads of 200 tons or 35 trucks each, viz., 200 tons or 35 trucks into the district No. 1, in order to supply Needham Market, Stowmarket, and Mellis, being the said last-named places included in the district No. 1,—200 tons or 35 trucks into the district No. 2, to supply Elmswell and Thurston, being the said last-named places included in the said district No. 2,—and also 200 tons or 35 trucks into the district No. 3, to supply Hadleigh, being the said place included in the said district No. 3; whereas, according to the said regulations and rates, the said dealers in landborne coal are enabled to supply all their customers at Thurston, Elmswell, Mellis, Stowmarket, Needham Market,
*141] and Hadleigh, at the said lower *rates, by sending from Peterborough only one train-load of 200 tons or 35 trucks.

20. The complainants' traffic in coal at the places before mentioned as comprised in the said districts Nos. 1, 2, and 3, respectively, is not such as to admit of their sending a train-load of 200 tons or 35 trucks of coal at any one time into each of the said districts; and the consequence is, that they are unable to deal in coals at the said places in the districts Nos. 1, 2, and 3, with a reasonable profit.

21. The complainants believe the said districts and regulations and rates mentioned in the papers marked A. and B. respectively have been adjusted for the express purpose of preventing them and other merchants in the same trade at Ipswich from availing themselves of the lower rates mentioned in the said papers marked A. and B. respectively, by rendering it impossible for them, for the reasons aforesaid, to avail themselves of the said lower rates, so as to gain a reasonable profit; and to give to the said dealers in landborne coal an undue advantage, by enabling them to avail themselves of the said lower rates,—the demand for coals at the said places in the district No. 8 being such as to admit of the said dealers in landborne coal sending into the said district at one time a train-load of 200 tons or 35 trucks of coal at a considerable profit.

22. The prices per ton estimated according to the rates mentioned in the said papers A. and B. for carrying *from Ipswich* to the places in the district No. 8 in which the complainants so deal, are out of all proportion greater than the prices per ton for carrying *from Peterborough* to such places: thus, Bury St. Edmunds is distant from Ipswich 27 miles, and from Peterborough 74 miles; according to the rates in the paper marked B., the price for the carriage of coal in quantities of 200 tons
*142] or 35 trucks from Ipswich to *Bury St. Edmunds is 2*s.* 5*d.* per ton, inclusive of terminals, and the price according to the rates in the paper marked A. for carrying coals from Peterborough to Bury St. Edmunds under the same circumstances, is 4*s.* 3*d.* per ton only, inclusive of terminals, and from Peterborough via Bury St. Edmunds, to Ipswich, a distance of 101 miles, 4*s.* 7*d.* per ton only. Thurston is distant from Ipswich 23 miles, and from Peterborough 78 miles; and the price according to the paper marked B., for the carriage of coal from Ipswich to Thurston is 2*s.* 2*d.* per ton, inclusive of terminals: whereas, the price, according to the paper marked A., for carrying coal from Peterborough to Thurston under the same circumstances, is 4*s.* 4*d.* per ton only. Elmswell is distant from Ipswich 18 miles, and from Peterborough 83 miles; and the price, according to the paper marked B., of carrying coal from Ipswich to Elmswell, is 1*s.* 10*d.* per ton,

inclusive of terminals; whereas, the price, according to the paper marked A., for carrying coal from Peterborough to Elmswell under the same circumstances, is 4*s.* 5*d.* per ton only. Diss is distant from Ipswich 27 miles, and from Peterborough 98 miles; and the price, according to the paper marked B., for carrying coal from Ipswich to Diss is 2*s.* 5*d.* per ton, inclusive of terminals; whereas, the price, according to the paper marked A., for carrying coal from Peterborough to Diss under the same circumstances is 4*s.* 6*d.* per ton only. Mellis is distant from Ipswich 23 miles, and from Peterborough 95 miles; and the price, according to the said paper marked B., of carrying coal from Ipswich to Mellis is 2*s.* 2*d.* per ton, inclusive of terminals; whereas, the price, according to the said paper marked A., of carrying coals from Peterborough to Mellis is 4*s.* 6*d.* per ton only. Stowmarket is distant from Ipswich 13 miles, and from Peterborough 88 miles; and the price, according to the paper marked *B., of carrying coal from Ipswich to Stowmarket is 1*s.* 6*d.* per ton, inclusive of terminals; whereas, the price, according to the paper marked A., of carrying coal from Peterborough to Stowmarket under the same circumstances, is 4*s.* 5*d.* per ton only. Needham Market is distant from Ipswich 9 miles, and from Peterborough 92 miles; and the price, according to the rates mentioned in the paper marked B., of carrying coal from Ipswich to Needham Market is 1*s.* 6*d.*, inclusive of terminals; whereas, the price, according to the paper marked A., of carrying coal from Peterborough to Needham Market under the same circumstances, is 4*s.* 5*d.* per ton only. Hadleigh is distant from Ipswich 13 miles; and the price, according to the paper marked B., of carrying coal from Ipswich to Hadleigh is 1*s.* 6*d.* per ton, inclusive of terminals; whereas the price, according to the paper marked A., of carrying coal from Peterborough to Hadleigh [a distance of 113 miles] under the same circumstances, is 5*s.* 1*d.* per ton only. [*143

23. There are no circumstances which render the cost to the company of carrying for the said dealers in landborne coal from Peterborough to the places in the district No. 8 less than the cost to the company of carrying for the complainants from Ipswich to the said places; or, at all events, there is no such difference of cost as to justify such a difference of charge.

24. It being, in consequence of the said adjustment of districts, and having regard to the limited quantity of coal required at the places at which the complainants trade, impossible for them in the ordinary course of business, or with a reasonable profit, to carry their coals in train-loads of 200 tons or 35 trucks, so as to avail themselves of the lower rates which according to the papers marked A. and B. respectively, are charged when coals are sent in *train-loads of 200 tons or 35 trucks, the complainants are obliged to send their coals by the ordinary goods trains; and the company consequently charge them for the carriage of their coals from Ipswich to Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Mellis, Diss, and Hadleigh, at the rate of 1*d.* per ton per mile, together with 6*d.* per ton for wagons, 4*d.* per ton for terminals, and 4*d.* per ton for tramway. [*144

25. There are no circumstances which render the cost to the company of carrying quantities of 200 tons or 35 trucks so much smaller than the cost of carrying quantities of less than 200 tons or 35 trucks as to

justify the last-mentioned charges; and the complainants believe the said difference of charge has been devised for the express purpose of giving to the dealers in landborne coal an undue preference over them.

The affidavit then set out comparative scales of charges made by the company to the complainants, and to others trading from Peterborough, as well prior to the issuing of the injunction in January, 1857, as of the charges now made,—*for which see opposite.* It also contained an allegation, that, notwithstanding the regulations and rates in the papers marked respectively A. and B., the company had on various occasions carried landborne coal from Peterborough to places in the district No. 8 in less quantities than 200 tons or 35 trucks, and by ordinary goods trains at the lower rates. It further proceeded to allege that the difference of charge had the effect of entirely destroying the trade of the complainants at the places named. The relative distances of the places referred to were given as follows:—Between Peterborough and Bury St. Edmunds, 74 miles,—Bury St. Edmunds and Thurston, 4 miles,—Thurston and Elmswell, 5 miles,—Elmswell and Mellis, 12 miles,—Mellis and
*146] Diss, 3 *miles,—Elmswell and Stowmarket, 5 miles,—Stowmarket and Needham market, 11 miles,—Stowmarket and Ipswich, 9 miles,—Ipswich and Hadleigh, 12 miles,—Ipswich to London, 69 miles. The affidavit then concluded with a general allegation that the complainants had in consequence of the inequality of charges been wholly deprived of their trade with the places enumerated.

Bovill, Q. C., and *Sharpe*, showed cause upon affidavits of the traffic-manager and the principal engineer of the company. These commenced with a general denial that the company in fixing the districts and the charges for carrying coals had any intention to prejudice the one set of dealers or to give any undue advantage to the other. They then proceeded to state that the quantity of 200 tons or 35 trucks, has been fixed upon as the quantity to be despatched by each coal train from any of the several points of despatch, as that quantity is an ordinary train-load of coal; and that, if a less quantity were carried by a separate train, the cost to the company in the carriage of such less quantity per ton per mile would be so increased that the scales of rates published on the 1st of May, 1857, would not realize to the company any remuneration or return for such carriage of coal beyond or in addition to the actual cost incurred by the company in the working expenses of such trains, and consequently the less the quantities carried in separate trains the greater in proportion would be the cost to the company of conveyance of such trains, and the less the returns: That, in reference to the adjustment of the districts for coal traffic upon the lines of railway under the management of the company, and the regulating and fixing the scale of coal-rates issued by the company on the 1st of May, 1857, the actual cost or amount of working expenses to the company are not in direct
*147] proportion to *the number of trains run, neither are such expenses directly proportioned to the number of miles run, but are dependent upon the two conditions of number of trains and number of miles run; and that, in estimating the actual cost or amount of working expense incurred by the company in the carriage of coals, it may be assumed, for all practical purposes, that about one-half of the expenses of the company are caused by the number of trains, and are not affected by the number of miles run by those trains, and that the other half of

**Scale of charges made to the complainants prior to Jan. 29, 1857, for the carriage of coals from Ipswich—* [*145

To	Per ton.	Per ton per mile.
Needham Market	1s. 10d.	2⅜d.
Stowmarket	2s. 11d.	2½d.
Elmswell	2s. 10d.	1⅞d.
Thurston	3s. 1d.	1⅝d.
Bury St. Edmunds	3s. 6d.	1½d.
Hadleigh	2s. 2d.	2d.
Mellis	3s. 1d.	1⅝d.
Diss	3s. 6d.	1½d.

Scale of charges, under existing regulations, for the carriage of coals for the complainants from Ipswich—

To	Per ton.	Per ton per mile.
Needham Market	2s. 4d.	3d.
Stowmarket	2s. 4d.	2½d.
Elmswell	2s. 8d.	1⅞d.
Thurston	3s. 1d.	1⅝d.
Bury St. Edmunds	3s. 5d.	1½d.
Hadleigh	2s. 4d.	2½d.
Mellis	3s. 1d.	1⅝d.
Diss	3s. 5d.	1½d.

Scale of charges made to Messrs. Prior, previously to Jan. 29, 1857, for the carriage of coals from Peterborough—

To	Per ton.	Per ton per mile.
Needham Market	4s. 6d.	$\frac{9}{16}$d.
Stowmarket	4s. 6d.	½d.
Elmswell	5s. 0d.	1½d.
Thurston	5s. 0d.	⅝d.
Bury St. Edmunds	5s. 0d.	$1\frac{3}{16}$d.
Hadleigh	4s. 8d.	½d.
Mellis	5s. 0d.	⅝d.
Ipswich	4s. 0d.	½d.

Scale of charges, under existing regulations, for carriage of coals for other persons than the complainants, from Peterborough—

To	Per ton.	Per ton per mile.
Needham Market	4s. 5d.	$\frac{9}{16}$d.
Stowmarket	4s. 5d.	$\frac{9}{16}$d.
Elmswell	4s. 5d.	$\frac{10}{16}$d.
Thurston	4s. 4d.	$\frac{11}{16}$d.
Bury St. Edmunds	4s. 3d.	$\frac{12}{16}$d.
Hadleigh	5s. 1d.	$\frac{8}{16}$d.
Mellis	4s. 6d.	$\frac{9}{16}$d.
Diss	4s. 6d.	$\frac{9}{16}$d.
Ipswich	4s. 7d.	$\frac{9}{16}$d.

such expenses are caused by the number of miles run, and are not altered by the number of trains, notwithstanding such trains may be few or many in number, so long as the aggregate mileage run by such trains remains the same: That the regulations and the scales of rates for the carriage of coals were made by the traffic-manager of the company in pursuance of the instructions of the directors given to him to carry into effect the injunction issued by this court in the matter of the former complaint made by the complainants against the company,(a) and deponent believed that the regulations so made and the scales of rates so fixed as aforesaid for the carriage of coal do bonâ fide carry into effect the said injunction: That, from the 1st of May, 1857, the company, their agents and servants, had altogether absolutely desisted from giving an undue preference to any person or persons whatsoever for or in respect of the carriage of coals on their railways, and that the company had from that day carried coals for the complainants on equal terms with all persons whatsoever, having due regard to the circumstances (if any) which rendered the cost to the company of carrying for the one
*148] party less than the cost of carrying for *the other party: That the districts mentioned in the regulations marked A. and B. respectively, and the other regulations referred to, were fixed and assigned by the traffic-manager, having regard to the quantity of coals carried along the lines of the company, and the places from and to which coals were carried, at the time of the revising of the said scale of rates, and also having regard to the consumption of coal which would be required for the use of the population of the several places comprised within the districts mentioned in the said regulations; and that the said districts had not been fixed or assigned or the said regulations for the conveyance of coal made to give any undue preference or advantage to any persons whatever, or to give any undue preference or advantage to landborne coal over seaborne coal, or of preventing the complainants from dealing at the several places at which they so deal as aforesaid, or of excluding seaborne coal from those places, or of interfering with the trade of the complainants, for that, by the revised scale of rates, the profit accruing to the company for the carriage of a given quantity of seaborne coal from Ipswich to the several places at which the complainants so deal in coal, is greater than for the carriage of the same quantity of landborne coal from Peterborough to those places: That the cost to the company of the carriage of large quantities of coals for long distances is proportionately less per ton per mile than the cost of the carriage of small quantities for short distances, and consequently the profit to the company is greater per ton per mile for the carriage of large quantities for long distances than for the carriage of small quantities for short distances, and therefore that the company can afford to carry coal for long distances at a less rate per ton per mile than they can afford to carry coal for short distances. The affidavits, after enumerating the
*149] *several places, with the amount of their population respectively, whose supply of coal was derived from the several stations within the districts mentioned in the regulations marked A. and B., proceeded to allege,—that there are circumstances which render the cost per ton

(a) See In re Ransome and The Eastern Counties Railway Company, 1 C. B. N. S. 437 (E. C. L. R. vol. 87).

per mile to the company of carrying coal from Peterborough to the places in the district No. 8, mentioned in the paper marked A., less than the cost of carrying coal for the complainants from Ipswich to the said places, and that there is such a difference of cost as to justify such a difference of charge as mentioned in the complainants' affidavit, because the distance from Peterborough to the places to which the complainants trade are as follows, that is to say,—from Peterborough to Thurston, 78 miles,—to Mellis, 95 miles,—to Stowmarket, 88 miles,—to Needham Market, 92 miles,—to Hadleigh, 113 miles,—to Elmswell, 83 miles,—to Bury St. Edmunds, 74 miles,—to Diss, 98 miles,—whereas, the distances from Ipswich to the places at which the complainants trade are as follows,—to Thurston, 23 miles,—to Mellis, 23 miles,—to Stowmarket, 13 miles,—to Needham Market, 9 miles,—to Hadleigh, 13 miles,—to Elmswell, 18 miles,—to Bury St. Edmunds, 27 miles,—to Diss, 27 miles; because the cost to the company of the carriage of coal for long distances is proportionately less than the cost of the carriage of coal for short distances. The affidavits then went on to allege that the cost to the company of getting ready a coal-train of 35 trucks or 200 tons alone, is about one-half the cost to them of carrying a similar coal-train a distance of 100 miles, and that the cost to the company of carrying a similar train of coals the distances hereafter mentioned is as follows, viz. for a distance not exceeding 10 miles, 55/100ths of the cost of carrying coals in a similar train a distance of 100 miles,—for a distance not exceeding *20 miles, 60/100ths,—for a distance not exceeding 30 miles, 65/100ths,—for a distance not exceeding 40 [*150 miles, 70/100ths,—for a distance not exceeding 50 miles, 75/100ths,—for a distance not exceeding 60 miles, 80/100ths,—for a distance not exceeding 70 miles, 85/100ths,—for a distance not exceeding 80 miles, 90/100ths,—for a distance not exceeding 90 miles, 95/100ths; that the rates charged by the company in the scales referred to for the carriage of a coal-train of 200 tons the distances hereafter mentioned, are as follows, viz. for a distance not exceeding 10 miles, 28/100ths of the charges for carrying coals in a similar train a distance of 100 miles,—for a distance not exceeding 20 miles, 40/100ths,—for a distance not exceeding 30 miles, 54/100ths,—for a distance not exceeding 40 miles, 62/100ths,—for a distance not exceeding 50 miles, 78/100ths,—for a distance not exceeding 60 miles, 86/100ths,—for a distance not exceeding 70 miles, 92/100ths,—for a distance not exceeding 80 miles, 96/100ths,—for a distance not exceeding 90 miles, 98/100ths; and that, from a comparison of the above results, it appeared that the charges made by the company for the carriage of coals in train-loads of 200 tons from Peterborough to the places at which the complainants trade, was greater in proportion to the cost to the company of the carriage of coals in such trains, than were the charges made by the company for the carriage of coals in such trains from Ipswich to the places at which the complainants trade, in proportion to the cost to the company of the carrying of a similar coal-train from Ipswich to those respective places, and consequently that the profit to the company upon carrying coals in such trains from Peterborough to the last-mentioned places, was greater than the profit to the company upon carrying coals in such trains from Ipswich to the last-mentioned *places; and thus, so far [*151

from the scale of rates set out in the papers marked A. and B., and the other regulations referred to, tending to destroy the complainants' trade in coals, such scales of rates were more advantageous to the complainants, as compared with the cost to the company, than is such scale of rates as aforesaid to the persons trading in coals from Peterborough: That it was not true that the difference between the rates charged for the carriage of seaborne coals from Ipswich to the several places before mentioned, and those charged for the carriage of landborne coals from Peterborough to the same several places, tended to create a monopoly in the trade in coals in favour of landborne coals, inasmuch as the complainants, residing at Ipswich, and, on account of their local and geographical position, nearer to the said several places at which they trade, have an advantage over the traders in landborne coals to and at the same several places from Peterborough, since the gross cost of the carriage of such landborne coals from Peterborough to Bury St. Edmunds, the nearest of the said several places from Peterborough, is 4*s.* 3*d.* per ton (in the owners' wagons or trucks), while the gross rate of charge from Ipswich to Bury St. Edmunds, the farthest of the said several places from Ipswich, is only 2*s.* 5*d.* per ton: And that the scale of rates for the carriage of coals since the 1st of May, 1857, charged on the principle of proportionably lowering the rates for a larger than for a shorter distance, tended greatly to the advantage of the public, in extending the area of the supply of coal, and in diminishing the cost of coal to the consumer.

It was insisted, on behalf of the company, that the above affidavits completely negatived any intention on their part to evade or disregard the injunction of the court on the former occasion; that the arrangement *152] *of districts was shown to have been bonâ fide made, partly with a view to the convenience of the company themselves, and partly with a view to the benefit of the neighbouring places, and without any intention to prejudice or interfere with the trade of the complainants; that it was absolutely impracticable to frame a scale of charges so as to avoid the imposition of some disadvantage upon particular individuals; and that the difference of cost to the company had already been recognised,—in Ransome's Case, 1 C. B. N. S. 437 (E. C. L. R. vol. 87), and in Oxlade's Case, 1 C. B. N. S. 454,—as a justifiable ground for making differences of charge.

Byles, Serjt., and *T. Jones*, in support of the rule.—The districts have evidently been studiously adjusted and arranged for the express purpose of prejudicing the complainants; for, the result is, that, in order to enable them to have their coals carried at the lower rate, they must send a separate train-load of 200 tons into each of the three districts,—which is a greater quantity than their trade at the several places therein demands; whereas, the same arrangement places all or nearly all the places at which the Peterborough dealers trade in one district, and so gives them an advantage which is withheld from the Ipswich dealers. Then, the rates charged for the carriage of coal from Ipswich are out of all proportion higher than those charged for the carriage of coals from the contrary direction,—as appears from the comparative scales of charges at p. 145. The only answer which is offered to this part of the complaint, is, that there are circumstances which justify the difference

of charge, inasmuch as the cost of carrying coal for long distances and in large quantities is less in proportion than the cost of carrying it for shorter distances and in smaller *quantities. But that does not account for the circumstance of the scale of charges for the [*153 carriage of train-loads of coal from Peterborough diminishing precisely at the point where the landborne coal comes into competition with the seaborne coal,—thus depriving the complainants and the other dealers in the last-mentioned coal of a considerable portion of the natural advantage of their geographical position. There is no pretence for saying that the cost of carriage to the company is less in this intervening space. Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:

The rule in this case calls on the Eastern Counties Railway Company to show cause why an injunction should not issue against them, enjoining them to desist from giving any undue preference in respect of the carriage of coals, to dealers sending them from Peterborough towards certain places on the railway at which the complainants deal in coals, and from subjecting them to any undue prejudice in respect of the carriage of coals from Ipswich to those places, and enjoining the company to carry coals thither for the complainants on equal terms with the dealers sending coals from Peterborough, having due regard to the circumstances, if any, which render the cost of carrying for the one party less than the cost of carrying for the other.

The complainants charge the company with having contrived a scale of charges for the carriage of coals on their railroad with a view to give the traders in landborne coals brought along it from Peterborough, an undue advantage over the seaborne coals brought along it from Ipswich.

On the argument, before my Brothers Crowder and *Willes and myself, the complaint was rested by the counsel for the [*154 applicants mainly on two grounds contained in the affidavits. The first was, that the company, since May 1st, 1857, have established a system of carrying coals according to assigned districts, comprising certain places on their lines and their various branches, and within these several districts the company carry coals at certain lower rates for quantities not less than what is called a train-load, *i. e.* 200 tons, or 35 trucks. The complainants, who are coal-dealers at Ipswich, also carry on that business at Needham Market, Stowmarket, Elmswell, Thurston, and Bury, which are places on that branch of the company's lines which conducts to Peterborough; and also at Mellis and Diss, which are on another branch line communicating with that first mentioned; and also at Hadleigh, which is on another distinct branch. These districts, the complainants assert, have been so adjusted that the places where they deal, instead of being put into one district, are distributed into three; so that, in order to take advantage of the reduced rates, it is necessary to send from Ipswich three train-loads, one into each district,—which is a greater quantity than their traffic demands. They say, therefore, that it is thus rendered impossible for them to avail themselves of the lower rates: whereas, the districts are so arranged, that, for dealers sending coals from Peterborough, instead of from Ipswich, a single district is constituted, which comprises, besides other places, seven of those at which the complainants deal, and so affords a traffic requiring such a

quantity of coals as enables the Peterborough dealers to take advantage of the lower rates.

On the part of the company, the greater part of these suggestions is denied by affidavit: and, particularly, it is sworn by Mr. Mosely, the traffic-manager, that the company would make no profit at all, if they *155] were to *carry a less quantity than a train-load, in a separate train, at the lower rate; and that, as to the adjustment of the districts, they were fixed and assigned by himself, having regard to the quantity of coals carried along the lines, and the places to and from which they were carried, and the consumption of coal which would be required for the use of the population of the places comprised in the districts: and he goes on to deny positively that they were fixed or adjusted in order to give any undue preference to the landborne coal-traders, or work any prejudice to the seaborne. And it is also sworn that the districts into which the places where the complainants deal are distributed, comprise also other places containing a large population.

On the whole, therefore, we think that this ground of complaint has not been sustained; for, although we think the company have failed to show that the district system, arranged as it now stands, is not disadvantageous to the complainants, yet, looking at the affidavits on both sides, we cannot find sufficient to justify us in coming to the conclusion that the complainants are unduly subjected to this disadvantage, or that it is caused by any undue preference or partiality, as suggested. It is their misfortune, which we cannot remedy, if the state of their trade is such that it happens not to accommodate itself to a scale and system of rates which does not appear to be disadvantageous to the public at large, or objectionable in other respects.

The second ground of complaint is, that the company charge rates for carrying coals from Ipswich to places where the complainants deal, which, it is alleged, are out of all proportion greater than the rates charged for carrying coals from Peterborough to those places; inasmuch as the company charge for carrying a train-load from Ipswich to Bury, which is only 27 miles, the sum of 2*s.* 5*d.*, and from Peterborough to *156] the same place, *which is 74 miles, the sum of 4*s.* 3*d.*,—from Ipswich to Thurston, which is 23 miles, the sum of 2*s.* 2*d.*, and from Peterborough to the same place, which is 78 miles, the sum of 4*s.* 4*d.*,—from Ipswich to Elmswell, which is 18 miles, the sum of 1*s.* 10*d.*, and from Peterborough to the same place, which is 83 miles, the sum of 4*s.* 5*d.*,—from Ipswich to Diss, which is 27 miles, the sum of 2*s.* 5*d.*, and from Peterborough to the same place, which is 98 miles, the sum of 4*s.* 6*d.*,—from Ipswich to Mellis, which is 23 miles, the sum of 2*s.* 2*d.*, and from Peterborough to the same place, which is 95 miles, the sum of 4*s.* 6*d.*: and a similar disproportion between the distances over which the coals are carried, and the prices charged for carrying them, is shown as to the other places where the complainants deal.

In answer to this, it is sworn, on the part of the company, that there are circumstances which render the cost to the company per ton per mile of carrying coal from Peterborough to the places where the complainants deal, less than the cost of carrying coal from Ipswich, so as to justify the difference of charge: because the cost of carrying coal for long distances is proportionably less than the cost of carrying it for short

distances. It is further sworn, that, on an analysis of the comparative cost of carrying for various distances ranging from 10 to 90 miles, and of the rates charged by the company for those distances, and a comparison of those results, it appears that the charges made by the company for carrying coals from Peterborough to the places where the complainants deal, are greater in proportion to the cost of carrying than the charges made by the company for carrying coals from Ipswich to those places; and, consequently, that the profit to the company is greater with respect to the former than the latter. It is also sworn that the adjustment of districts, and the scale of rates for the *carriage of coals, are not confined to Peterborough and Ipswich, but [*157 extend on precisely the same footing to other places on the company's lines, viz., the ports of Wisbeach, Lynn, Yarmouth, Lowestoft, Harwich, and Colchester.

But there is a portion of the scale of rates as to which we think no satisfactory explanation has been given by the company. The scale for train-loads of coals in the owners' wagons begins to increase at the distance of 14 miles. From thence up to the point of 20 miles it increases at the rate of 1*d.* per ton per mile. It then goes on increasing (with some exceptions) at the rate of 1*d.* for every two miles, till it reaches the point of 60 miles. Then it increases at the rate of 1*d.* for 3 additional miles, and then at the rate of 1*d.* for 4 additional miles, till it reaches the point of 75 miles. Then it increases only 1*d.* for 6 additional miles, till it reaches the point of 81 miles: and then it increases only 1*d.* for the additional distance of 12 miles, till it reaches the point of 93 miles; and then it increases only 1*d.* for the additional distance of 6 miles, till it reaches the point of 100 miles. The scale then reverts to the earlier ratio of increasing at the rate of 1*d.* for every 2 miles, and continues invariable at that rate of increase till it reaches the maximum distance, viz., 137 miles.

It is therefore obvious, that, on this scale, the charge is the same to the Peterborough dealers, whether they send their coals, in the direction of the places where the complainants deal, 76 or 81 miles, and whether they send them 82 or 93 miles, and whether they send them 95 or 100 miles. In effect, as far as respects the cost of carriage, the distance from Peterborough is abridged, in these instances, to the extent of 5, 11, and 5 miles respectively; and the Peterborough dealers are only charged 2*d.* per ton for the journey of 24 miles which intervenes between the point of 76 miles distance from *Peterborough and the point of [*158 100 miles distance from that place. And it will be found that between these points lie all the places (except Bury and Hadleigh) where the complainants deal, and where the landborne coal is alleged to be brought into competition with the seaborne. And thus the carriage from Peterborough to Stowmarket and Needham Market (two of the places where the complainants deal), which are distant respectively 88 and 92 miles from Peterborough, is charged the same as if they were distant only 82 miles. And the distance from Bury to Diss,—including in its course Thurston, Elmswell, and Mellis, and amounting to 24 miles,—only increases the charge to the Peterborough dealers by 3*d.* But, as soon as the distance reaches 100 miles, that is, as soon as the places where the competition exists are passed, the scale resumes the increasing ratio of 1*d.* for every 2 miles.

This anomalous part of the scale is not accounted for by the company, as far as we can discover. It is true that it pervades all the districts, and is applied to Lynn and Yarmouth and all the other ports on the company's lines, and is not peculiar to that portion of them which conducts from Peterborough to Ipswich. If it had been so, the pressure on the complainants would have been so transparent that it would have been a palpable evasion of the injunction already obtained in this court by the same complainants against this company: see In re Ransome, 1 C. B. N. S. 437 (E. C. L. R. vol. 87).

But the question remains, whether the rate, even thus guarded, must not necessarily be deemed, when closely considered, as in reality a disguised infringement of the principles on which the judgment of this court on that occasion was founded. The effect of such a scale of charges, is, to diminish the natural advantages which the position of the dealers at Ipswich, by reason of its greater proximity, gives them over
*159] the dealers at *Peterborough, in respect of the traffic at Thurston, Elmswell, Stowmarket, Needham Market, Mellis, and Diss, by annihilating, in point of expense of carriage, a certain portion of the distance between Peterborough and those places. And just in the proportion by which the natural advantage is diminished, an undue preference is given to the Peterborough dealers, and an undue disadvantage is brought upon the complainants and the other Ipswich dealers.

We are, therefore, of opinion that a writ must issue, enjoining the company to desist from giving an undue preference, in respect of the carriage of coals, to persons sending coals from Peterborough or other places to or towards the places mentioned in the rule. And we think the company ought to pay the costs of this application.

The rule was drawn up as follows:—"It is ordered that a writ of injunction do issue against the said company pursuant to the Railway and Canal Traffic Act, 1854, enjoining the said company to desist from giving an undue preference in respect of the carriage of coals on the railways of the said company to persons sending coals by the said railways from Peterborough or other places to or towards Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, or any of them,"—with costs.

T. Jones, in Easter Term, 1858, obtained a rule calling upon six persons (named), directors of the Eastern Counties Railway Company, to show cause why a writ or writs of attachment should not issue forth
*160] against them as such directors, for disobedience of the above *writ of injunction, on the ground that, professing to obey the writ, the company had altered their rates of charges in such a manner as to leave the substantial grievance complained of still existing. The affidavits upon which the motion was founded, after referring to the former application and to the writ issued in pursuance thereof, proceeded to state, that, on the 26th of March, 1858, the company issued new regulations for the conveyance of coals from Ipswich and from Peterborough, and a new scale of coal-rates of which the following is a copy:—

Miles.	Rate per ton, inclusive of terminals.		Miles.	Rate per ton, inclusive of terminals.		Miles.	Rate per ton, inclusive of terminals.	
	s.	d.		s.	d.		s.	d.
1 to 7 . .	1	0	55 . .	3	9	97 . .	4	9
8 to 14 . .	1	6	56 . .	3	10	98 . .	4	9
15 . .	1	7	57 . .	3	10	99 . .	4	9
16 . .	1	8	58 . .	3	10	100 . .	4	10
17 . .	1	9	59 . .	3	11	101 . .	4	10
18 . .	1	10	60 . .	3	11	102 . .	4	10
19 . .	1	11	61 . .	4	0	103 . .	4	10
20 . .	2	0	62 . .	4	0	104 . .	4	11
21 . .	2	1	63 . .	4	0	105 . .	4	11
22 . .	2	1	64 . .	4	1	106 . .	4	11
23 . .	2	2	65 . .	4	1	107 . .	4	11
24 . .	2	3	66 . .	4	1	108 . .	5	0
25 . .	2	4	67 . .	4	1	109 . .	5	0
26 . .	2	4	68 . .	4	2	110 . .	5	0
27 . .	2	5	69 . .	4	2	111 . .	5	0
28 . .	2	6	70 . .	4	2	112 . .	5	1
29 . .	2	7	71 . .	4	2	113 . .	5	1
30 . .	2	7	72 . .	4	3	114 . .	5	1
31 . .	2	8	73 . .	4	3	115 . .	5	1
32 . .	2	9	74 . .	4	3	116 . .	5	2
33 . .	2	10	75 . .	4	3	117 . .	5	2
34 . .	2	10	76 . .	4	4	118 . .	5	2
35 . .	2	11	77 . .	4	4	119 . .	5	2
36 . .	2	11	78 . .	4	4	120 . .	5	3
37 . .	3	0	79 . .	4	4	121 . .	5	3
38 . .	3	1	80 . .	4	5	122 . .	5	3
39 . .	3	1	81 . .	4	5	123 . .	5	3
40 . .	3	2	82 . .	4	5	124 . .	5	4
41 . .	3	2	83 . .	4	5	125 . .	5	4
42 . .	3	3	84 . .	4	6	126 . .	5	4
43 . .	3	4	85 . .	4	6	127 . .	5	4
44 . .	3	4	86 . .	4	6	128 . .	5	5
45 . .	3	5	87 . .	4	6	129 . .	5	5
46 . .	3	5	88 . .	4	7	130 . .	5	5
47 . .	3	6	89 . .	4	7	131 . .	5	5
48 . .	3	6	90 . .	4	7	132 . .	5	6
49 . .	3	6	91 . .	4	7	133 . .	5	6
50 . .	3	7	92 . .	4	8	134 . .	5	6
51 . .	3	7	93 . .	4	8	135 . .	5	6
52 . .	3	8	94 . .	4	8	136 . .	5	7
53 . .	3	8	95 . .	4	8	137 . .	5	7
54 . .	3	9	96 . .	4	9			

*The affidavits then went on to state, that, up to the 26th of March, 1858, the company charged the same rates for the carriage of coals *from Peterborough* to Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, as they did prior to the application for and the granting of the injunction; and up to the 26th of March, 1858, the company charged the same rates for the carriage of coal *from Ipswich* to Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, and Diss, as they did before the injunction: That, since the injunction, the company have charged the complainants the same rates for the carriage of coal from Ipswich to the places last mentioned as they did prior thereto: That, since the 26th of March, 1858, the company have charged [*162

for the carriage of coal from Peterborough and Ipswich the rates mentioned in certain new scales: That, according to the new scale, the charge for the carriage of coal a distance of 137 miles (being the maximum distance mentioned in such new scale) is 5*s*. 7*d*. per ton, whereas, prior to the injunction, the charge for a similar distance was 6*s*. 1*d*.: That Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, are the principal places at which the complainants trade in coal, and they all lie between 74 and 113 miles from Peterborough; and the company now charge the same rates for the carriage of coal for the said distance of 113 miles from Peterborough as they did prior to the injunction;—thus, before the injunction, the rates charged for the carriage of coal between Peterborough and Bury St. Edmunds, a distance of 74 miles, was 4*s*. 3*d*. per ton, and between Peterborough and Hadleigh, viâ Bury and Ipswich, a distance of 113 miles, was 5*s*. 1*d*. per ton; according to the new scale, the *charge for the carriage of coal from Peterborough to Bury St. Edmunds is 4*s*. 3*d*. per ton, and from Peterborough to Hadleigh, viâ Bury St. Edmunds and Ipswich, 5*s*. 1*d*. per ton,—being in fact a charge of 10*d*. per ton, or ¼*d*. per ton per mile for the distance of 39 miles between Bury St. Edmunds and Hadleigh; and the company, according to the new scale of coal-rates, charge for the carriage of the complainants' coal from Ipswich, under the same circumstances, the said distance of 39 miles, 3*s*. 1*d*. per ton: That since the injunction, the company had not made any alteration in the rates for the carriage of coals from Peterborough to Bury St. Edmunds, Elmswell, Thurston, and Hadleigh, or from Ipswich to those places; and that, with regard to such places, the company had not in any way obeyed the writ, but gave exactly the same undue preference in respect of the carriage of coals to persons sending coals from Peterborough to those places as they did before, and subjected the complainants and their traffic to the same undue disadvantage in respect of the carriage of their coal from Ipswich to those places as they did before: That the company, by their new scale, had made certain alterations in their charges for the carriage of coals from Peterborough to certain other of the places at which the complainants deal, that is to say, from Peterborough to Needham Market, a distance of 92 miles, the rate prior to the injunction was 4*s*. 5*d*. per ton, now 4*s*. 8*d*.,—to Stowmarket, a distance of 88 miles, the rate prior to the injunction was 4*s*. 5*d*. per ton, now 4*s*. 7*d*.,—to Mellis, a distance of 95 miles, the rate prior to the injunction was 4*s*. 6*d*. per ton, now 4*s*. 8*d*.,—to Diss, a distance of 98 miles, the rate prior to the injunction was 4*s*. 6*d*. per ton, now 4*s*. 9*d*.,—and to Ipswich, a distance of 101 miles, the rate prior to the injunction was 4*s*. 7*d*. per ton, now 4*s*. 10*d*.: That, by the

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new scale, the *company had between the distance of 64 miles and 101 miles, that is, between 10 miles north of Bury and Ipswich, made an uniform rate of charge of ¼*d*. per ton per mile, which increases the charge per ton to the Peterborough dealer of carriage of coal between those two places in the aggregate by the sum of 3*d*. per ton: That, between the said distance of 64 miles and 137 miles from Peterborough, the whole of the seaborne coal traffic arriving at the port of Ipswich and the ports south thereof on the company's line of railway, comes into competition with the landborne coals from Peterborough; and whilst by the new scale of rates an additional charge in the aggre-

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gate of 3*d.* per ton over and above the charge previous to the injunction was made to the dealer in coal from Peterborough between the distance of 64 miles and 101 miles, the aggregate charge was diminished by 9*d.* per ton to such dealer in coal from Peterborough between the said distance of 101 miles and 137 miles: That Hadleigh is distant from Peterborough 113 miles, and from Ipswich 12 miles; and that, previous to the injunction, the charge for the carriage of coal to the dealers from Peterborough, viâ Ipswich, to Hadleigh, was 5*s.* 1*d.*, or 6*d.* per ton, or ½*d.* per ton per mile, for the excess distance of 12 miles between Ipswich and Hadleigh,—the charge then being from Peterborough to Ipswich 4*s.* 7*d.* per ton; whereas, by the new scale, the charge for the carriage of such coal from Peterborough, viâ Ipswich, to Hadleigh, is, for such excess distance of 12 miles, 3*d.* per ton only, or ¼*d.* per ton per mile,—being an additional advantage or preference of ¼*d.* per ton per mile in the carriage of coal from Ipswich to Hadleigh given by the company to or in favour of persons sending coal from Peterborough, viâ Ipswich, to Hadleigh, than existed prior to the injunction. The affidavits then set out a *scale of the rates charged to the Peterborough dealers previously to the first application against the company, and also [*165 the charges made previously to the second application, and since the issuing of the injunction to the several places named:—

From Peterborough	Miles.	Previous to first application for writ of injunction.	Previous to second application and service of the writ.	Since the service of the writ, and according to new scale.
To Needham Market	92	4*s.* 6*d.* per ton.	4*s.* 5*d.* per ton.	4*s.* 8*d.* per ton.
Stowmarket . .	88	4*s.* 6*d.* ...	4*s.* 5*d.* ...	4*s.* 7*d.* ...
Elmswell . . .	83	5*s.* 0*d.* ...	4*s.* 5*d.* ...	4*s.* 5*d.* ...
Thurston . . .	78	5*s.* 0*d.* ...	4*s.* 4*d.* ...	4*s.* 4*d.* ...
Bury St. Edmunds	74	5*s.* 0*d.* ...	4*s.* 3*d.* ...	4*s.* 3*d.* ...
Hadleigh . . .	113	4*s.* 8*d.* ...	5*s.* 1*d.* ...	5*s.* 1*d.* ...
Mellis	95	5*s.* 0*d.* ...	4*s.* 6*d.* ...	4*s.* 8*d.* ...
Diss	98	5*s.* 0*d.* ...	4*s.* 6*d.* ...	4*s.* 9*d.* ...
Ipswich	101	4*s.* 0*d.* ...	4*s.* 7*d.* ...	4*s.* 10*d.* ...

The affidavit then went on to state that the rates charged by the company according to the new scale for carrying coal for the complainants from Ipswich to Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, were out of all proportion greater than the rates charged for carrying coals from Peterborough to Needham Market, Stowmarket, Elmswell, Thurston, Bury St. Edmunds, Hadleigh, Mellis, Diss, and Ipswich, under like circumstances; and that there were no circumstances which rendered the cost to the company of carrying coal from Peterborough to those places less than the cost of carrying coal from Ipswich to the same places.

The affidavit then proceeded to refer to and observe upon a report of the directors of the Eastern Counties Railway Company containing statements as to the *expenses of the locomotive department, [*166 from which deductions were drawn which were at variance with some of the statements in the affidavits used on the part of the company on the former occasion; and, in particular,—referring to the affidavit of the traffic-manager, wherein he stated that "he had carefully calculated the cost to the company of the working of the trains for the carriage

and conveyance of coals, and that he found from experience and calculation that the cost to the company of preparing and getting ready to start a coal-train of 35 trucks or 200 tons, without carrying or conveying the said coals any distance whatever, was about one-half, or 50 per cent., of the cost to the company of carrying and conveying a similar coal-train a distance of one hundred miles,"—alleged, that, if such statement were correct, the actual cost to the company (according to the said report) of preparing and getting ready to start one of such train-loads would be the sum of 2*l.* 12*s.*, or about 3*d.* per ton only.

The affidavit further proceeded to allege, that, according to the new scale of rates, the company charge the persons sending coal from Peterborough, for the carriage of such coals 91 miles, that is to say, from Cambridge to Maldon,—Cambridge being forty-five miles from Peterborough, and Maldon 136 miles,—the sum of 2*s.* 2*d.* per ton; whereas, by the said new scale, the company charge the complainants for sending such coal 27 miles,—that is, from Ipswich to Bury St. Edmunds,—the sum of 2*s.* 5*d.* per ton: That, according to the said new scale, the company charge the complainants for the carriage of coal a distance of 37 miles, the sum of 3*s.* per ton; whereas, they charge the other dealers from Peterborough 2*s.* 7*d.* per ton only for the carriage of their coal the further distance of 100 miles: That, according to the new scale, the company charge for the carriage of coals for the first 32 miles 2*s.* 9*d.* per ton, *for the second 32 miles 1*s.* 4*d.* per ton (or, less than half), for the third 32 miles 8*d.* per ton only (or, nearly three-fourths less than the amount charged for the first 32 miles), and for the fourth 32 miles 8*d.* per ton only,—that is to say, they charge 1*d.* per ton more for the first 32 miles than they do for the following 96 miles; or more than three times as much for the first 64 miles as they charge for the next 64 miles: That the whole of the places at which the complainants deal in coal lie within a distance of 32 miles from Ipswich; and, in consequence of the natural position of Ipswich, the merchants or dealers in coal there (which is seaborne to Ipswich) are limited to about that distance, and they cannot advantageously send coal a greater distance; that, if they were to send coal by the company's railway a further distance than 32 miles towards Norwich, they would come into close competition with the coals which are seaborne to the ports of Lowestoft and Yarmouth; that, if they were to send coal by the company's railways a further distance than 32 miles towards London, they would then come into close competition with the coals which are seaborne to the ports of Maldon and London; and that, if they were to send coal by the company's railways a further distance than 32 miles towards Cambridge, they would then come not only into close competition with the inland coal from Peterborough, but also into close competition with the coals which are seaborne to the ports of Lynn and Wisbeach; that the effect of the new scale of coal-rates was, to give the same preference or advantage to persons sending coals from Peterborough to the said places at which the complainants dealt, as existed prior to their application and the issuing of the writ of injunction, and entirely deprived them of the natural advantages which their position by reason of the proximity of Ipswich to the sea gave them; that, unless the grievance they *complained of was altered, the trade in seaborne coal to Ipswich would be utterly superseded and destroyed, and the

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prosperity of the port and their trade ruined; and that the object of the company in making the said scale of rates was for the purpose of competing with and destroying the trade in seaborne coal: That the company carry coals for the persons sending them from Peterborough to or towards the places at which the complainants deal, and charge to such persons the rate specified in the new scale of coal-rates for the carriage of full train-loads, although the said coals are not conveyed from Peterborough for such persons to such places in full train-loads of 200 tons or 35 trucks: That the said coals start from Peterborough to such places and the other districts in which such persons sending coals from Peterborough deal, in full train-loads of 35 trucks or 200 tons; that, when the train reaches Cambridge, and sometimes Bury St. Edmunds (which are distant from Peterborough respectively 45 miles and 74 miles), the train no longer remains a special or full coal-train; and that such coals stay either at Cambridge or Bury St. Edmunds, or are taken on from Cambridge and Bury St. Edmunds to such places and districts by different engines, and generally form part of the ordinary goods trains: That, in order to get such coals from Peterborough to Mellis, they have to be brought to the Haughley junction, and at the Haughley junction they are conveyed to Mellis by a different train and a different engine than that by which they are brought from Peterborough or Cambridge: That the coals carried by the company from Ipswich to Mellis for the complainants and other merchants at Ipswich, are conveyed from Haughley junction to Mellis by the same trains and engines as convey the coals from Haughley junction to Mellis of the persons so sending them from Peterborough to Mellis: That, in *order to get coals from Peterborough to Hadleigh, they have to be brought through [*169 Ipswich to Bentley junction; and from Bentley junction they are conveyed by a different train and by a different engine than that by which they were brought to Bentley from Peterborough or Cambridge: And that the coals carried by the company from Ipswich to Hadleigh for the complainants and other merchants at Ipswich, are conveyed by the same train and engine as the coals of the persons so sending them from Peterborough to Hadleigh.

Bovill, Q. C., and *Sharpe*, showed cause, upon affidavits by the engineer and traffic-manager, and the several directors of the company, the former of whom deposed in substance as follows:—That, immediately after the delivery of the judgment upon the former motion, the chairman of the board of directors caused a copy of such judgment to be delivered to the traffic-manager, with instructions honestly, fairly, and bonâ fide to alter and amend the scale so as to carry out the judgment according to its true intent and meaning, and so that no undue preference should be given to the Peterborough dealers, and no undue disadvantage should be brought upon the complainants and the other Ipswich dealers in coal: That the traffic-manager altered and amended the scale accordingly, and that the directors, after carefully considering the altered scale, and consulting their legal advisers thereon, adopted it in the bonâ fide belief that they were thereby fairly and honestly carrying out the judgment of the court, and that no undue preference was thereby given to the Peterborough dealers, and no undue disadvantage brought upon the complainants and other Ipswich dealers: That the rates and charges for the conveyance of coal for distances between one

mile and 75 miles, as contained in the former scales, were, as the depo-
*170] nents *believed, sanctioned and allowed by the judgment of this court as rates or charges by which no undue preference was given to the Peterborough dealers, and no undue disadvantage was brought upon the complainants and other Ipswich dealers, and therefore that no alterations or amendments were made in the said rates or charges, but that they remained as before. The affidavits then went on to state that there were circumstances which rendered the cost per ton per mile to the company of carrying coal from Peterborough to the places in the district No. 8 in the paper marked A. referred to in the complainant's affidavit, less than the cost to them of carrying coal for the complainants from Ipswich to those places, and that there was such difference of cost as to justify such a difference of charge as mentioned in the complainants' affidavit; and, after giving, as before, the relative distances of those several places from Peterborough and from Ipswich respectively, they assigned for reason that the cost to the company of the carriage of coal for long distances is proportionately less than the cost of the carriage of coal for short distances. The affidavits then went on to allege that it had been found by experience and calculation that the cost to the company of preparing and getting ready to start a coal-train of 35 trucks or 200 tons, without carrying the said coals any distance whatever, was about one-half of the cost to the company of carrying a similar coal-train a distance of 100 miles. They then gave tables showing the proportion which the cost to the company, and the sums charged by them respectively, for the conveyance of a full train distances varying from 10 to 90 miles, bore to the cost of carrying coals in a similar train a distance of 100 miles. They then alleged, that, from a comparison of those results, it appeared that the charges made
*171] by the company for the carrying of coal in trains of 35 *trucks or 200 tons from Peterborough to the places at which the complainants trade, was greater in proportion to the cost to the company of the carrying of coal in such trains than were the charges made by the company for carrying coals in such trains from Ipswich to the places at which the complainants trade, and consequently that the profit to the company upon carrying coals in such trains from Peterborough to the last-mentioned places was greater than the profit to the company upon carrying coals in such trains from Ipswich to the last-mentioned places; and thus, so far from the new scale tending to suppress and destroy the trade in coals of the complainants, it was more advantageous to the complainants compared with the cost to the company than to the persons trading in coals from Peterborough: That it was impossible so to construct scales of rates for the carriage of coals for a distance so long as 137 miles, without making the same rate or charge for the carriage of coals for different distances, or, in other words, "annihilating in point of expense of carriage" a certain portion of distance; and therefore, when the distance along which coals are carried increases considerably, and consequently the cost per ton per mile diminishes considerably, the greater will be the different distances in respect of which the same total rate is charged, or, in other words, the greater must necessarily be the distance annihilated or destroyed in point of expense of carriage: That, since the service of the writ of injunction, the company had charged to the dealers in coal at Peterborough for the carriage of their coal from

Peterborough to Ipswich an increased rate of 3*d.* per ton,—to Needham Market, an increased rate of 3*d.* per ton,—to Stowmarket an increased rate of 2*d.* per ton,—to Mellis an increased rate of 2*d.* per ton,—and to Diss an increased rate of 3*d.* per ton: That, according to *the new scale, the sum charged by the company for the carriage of [*172 coal a distance of 137 miles (being the maximum distance mentioned in such new scale) is 5*s.* 7*d.* per ton, and is 6*d.* per ton less than the sum formerly charged by them for the carriage of coal a similar distance, because the rates have been increased at an uniform rate of four miles for 1*d.* from 75 miles to the end of the scale, in order to carry out the judgment of this court; that no complaint had been made by the complainants as to the charges made by the company to the Peterborough dealers, or any other dealers in coals whatsoever, for the carriage of coal a distance of 137 miles; and that none of the towns of Thurston, Mellis, Stowmarket, Needham Market, Hadleigh, Bury St. Edmunds, Diss, and Ipswich are distant from Peterborough 137 miles: That, although it is true that the company charge for the carriage of coal from Peterborough to Bury St. Edmunds 4*s.* 3*d.* per ton, and from Peterborough to Hadleigh, viâ Bury St. Bdmunds and Ipswich, 5*s.* 1*d.* per ton, being (as alleged in the complainants' affidavit) a charge of 10*d.* per ton or ¼*d.* per ton per mile for the distance between Bury St. Edmunds and Hadleigh, yet it is only after the coals have been conveyed from Peterborough to Bury St. Edmunds as a part of the journey from Peterborough to Hadleigh, and after the company have become entitled to the charge of 4*s.* 3*d.* as aforesaid for the carriage from Peterborough to Bury St. Edmunds, that they charge for the part of the said journey from Bury St. Edmunds the sum of 10*d.* per ton; and that the company would not have received the said charge of 4*s.* 3*d.* per ton for the carriage of the said coals, unless they had afterwards been proceeding onwards to Hadleigh; and that the company would charge to the dealers in coal at Peterborough, and all other *persons whatever, the same charge per ton per mile for the carriage of coal from Bury St. Edmunds to Ipswich as they do to [*173 the complainants and other dealers in coal at Ipswich for the carriage of coal from Ipswich to Bury St. Edmunds, if the coals passing from Bury St. Edmunds to Ipswich had not been conveyed from Peterborough to Bury St. Edmunds as a portion of a longer distance from Peterborough to Hadleigh, along which the said coals had been or were to be carried by the company; and that the reason why the company charge the rate of 5*s.* 1*d.* for 113 miles, is, because the cost to the company of the carriage of coal for long distances is proportionately less than the cost of the carriage of coal for short distances, as shown in the former part of the affidavit: That, since the issuing of the injunction, the company had not made any alteration whatever in the charges for carriage of coals to persons sending coals from Peterborough to Bury St. Edmunds, Elmswell, Thurston, and Hadleigh; nor had they made any alterations in the charges for the carriage of coal from Ipswich to such places, for the reasons already stated: That the alteration in the scale of rates for the carriage of coal a distance of 113 miles, viz., the distance from Peterborough to Hadleigh, was made upon the principle of increasing the rates for the carriage of coal per ton between the distances of 75 miles and 137 miles, at the rate of 1*d.* for every four miles,

as before stated. The affidavits then adverted to the half-yearly report of the directors to the shareholders, and entered into a calculation of the cost to the company of conveying trains to the different places mentioned, and concluded with a general allegation that the introduction of landborne coal into the districts referred to operated beneficially to the public, by inducing competition, and so keeping down the price of sea-
*174] borne coals. The affidavits of *the chairman and directors disclaimed all intention to evade compliance with the injunction, and stated the instructions which they had given to their engineer and traffic-manager with a view to the carrying out the order of the court, and their belief that this had been done.

Atherton, Q. C., and *T. Jones*, were heard in support of the rule.

The arguments consisted entirely of observations upon the affidavits filed on the one side and on the other, and references to the former judgments upon the contests between these parties.

WILLIAMS, J.—I am of opinion that this rule must be discharged. The order of the court upon which the present application for an attachment is founded, was a general order that a writ should issue enjoining the company to desist from giving an undue preference, in respect of the carriage of coals, to persons sending coal from Peterborough towards the places mentioned in the rule which was made absolute on that occasion. But the rule was explained by the judgment which accompanied the grant of it, to be founded upon certain anomalous charges in the scale of rates which had been adopted by the company,—those anomalous charges being not only perfectly unaccounted for in the affidavits used by the company on that occasion, but also having in their nature a direct tendency to give an undue preference to the Peterborough dealers over the Ipswich dealers. Now, with respect to those particular features in the old rates, the company have substantially reformed all these. They have in the new scale which they have published adopted the suggestions
*175] which fell from the court with *reference to what would have been the proper mode of framing that scale: and this is accompanied by a most explicit affidavit that they have done their best to carry into effect the order of the court, and to construct a scale of rates that should be in all respects, to the best of their judgment and opinion, conformable to the order of the court. As far, therefore, as that goes, there is no doubt that this application for an attachment has entirely failed. But it has been contended,—and I will take it for granted that it has been properly contended,—on behalf of the applicants, that, looking at the general terms of the rule, notwithstanding the judgment was founded upon certain items in the scale of rates which have been reformed, it was open to them to contend that there had been a violation of the injunction generally by the new scale of rates giving an undue preference in other respects to the Peterborough dealers over the Ipswich dealers. And the main argument in support of that view of the case was based upon this:—It unquestionably appears upon the face of the new scale of rates that the charges made to the Peterborough dealers who sent coals to the places where they enter into competition with the Ipswich dealers, beginning with Bury St. Edmunds, is not at all in an equal ratio with the scale of charges imposed upon the Ipswich dealers. But then, on behalf of the company it is said that, though that is so, they account for it and justify it upon the ground that there is what has been

called the expense of preparing and starting the train, which falls upon the company in respect of every train which leaves the station, whatever be the distance it has to travel: so that the same expense is incurred by the company in that respect, whether the train goes 27 miles, or 100 miles, or any other distance that might be suggested. And it is said, that, taking that into account, the *disproportion in the charges, having reference to the distances, is fully accounted for. After [*176 a careful consideration of the affidavits on both sides, I am of opinion that that is a correct view of the case. It is admitted that there is such a general charge incurred by the company upon the starting of every train, whatever the distance it has to travel; and that circumstance, in my opinion, sufficiently accounts for the difference of charge which is complained of. But then it is urged, on behalf of the company, that, assuming that principle to be one upon which they are justified in acting, although it may justify the diminished scale of rates beyond a distance of 74 miles, it does not satisfactorily account for the rates up to that point for the shorter distances. It certainly must be admitted that the earlier part of the scale is not framed strictly in accordance with the principle suggested. For some reason, which is not apparent on the face of the affidavits, so far from their being based upon that principle, the rates are considerably lower: the increase is upon a different footing altogether: and it would appear that the company charge a great deal less than would be the proper charge if that principle had been adopted. But the question is, whether that affords any ground for making this rule absolute for an attachment against the company. I am of opinion that it does not. In the first place, I must observe that, although I find nothing in the affidavits made by the company's officers to justify or explain this anomalous rate of charge for the earlier distances, yet the observation of Mr. *Bovill* is perfectly true, that neither on the former occasion nor on this were the company at all challenged to account for this anomalous part of their scale: and in addition to this, it must be observed that it is not now shown that this diminished rate of charge is at all detrimental to the complainants, or *has in any way the effect of preferring the Peterborough dealers. Indeed, if the principle above [*177 suggested were carried out on all parts of the transit, the consequences would be still more injurious to the Ipswich dealers than the rates of which they now complain, by raising the rates considerably within the distance of twenty-seven miles, which comprises all the places where their coal enters into competition with that of the Peterborough dealers. I therefore think that no sufficient ground has been laid for an attachment, and consequently that the rule must be discharged, and discharged with costs.

CROWDER, J.—It seems to me also that the complainants have failed to establish any ground for calling upon us to make this rule absolute. In consequence of the judgment pronounced by the court upon the former occasion, it became necessary for the company to reform their scale of rates: and it appears that they have done so in the points to which their attention was particularly directed by the judgment. Looking at the affidavits produced before us in answer to this rule, I can find nothing in them which shows that there has been any wilful contempt of the order of the court, or any intention on the part of the company to evade a compliance with its injunction. On the contrary, it seems

that they have bonâ fide endeavoured to the best of their judgment and ability to comply with it. The affidavit of the company's engineer and traffic-manager shows that they have gone into very minute calculations as to the expense of running trains of 200 tons or 35 trucks, and have endeavoured to establish a principle upon which to found their rates of charge. They say that the cost of preparing a coal-train of 200 tons or 35 trucks amounts to one-half the entire expense of conveying a train
*178] of that description a distance of 100 *miles. Upon that foundation they appear to have proceeded so far as regards the greater part of the scale; and they show that all the charges which are particularly objected to as being too favourable to the Peterborough dealers have been adjusted upon that principle. But, on the part of the complainants, it is said that that principle presses heavily and unfairly upon the Ipswich dealers, who carry on the whole of their trade within a distance far short of 100 miles from that place. It may be that that is so: but, assuming that the company are right in their estimate of the comparative cost to them of the transit of a full train-load for the longer or the shorter distance, it is obvious, that, if the cost of starting the train were taken into the account, the charges for the shorter distances would be even larger than they now are. An observation to this effect having been made by the court in the course of the argument, and the counsel for the company being asked how they could afford, regard being had to the cost of preparing and starting a train, to charge such low rates as they do for the shorter distances, the answer I think was sufficiently suggestive, viz., that there are many circumstances which may induce a railway company to charge on parts of their line rates which leave them little or no remuneration,—as, the proximity of rivers or canals or other lines of railway which may enter into competition with them, and materially affect their interests. This seems to be the ground upon which, in all probability, the rates have been settled in the earlier portion of the scale which is complained of. If this were to be altered, the alteration, so far from benefiting, would very materially prejudice the interests of the Ipswich dealers. Looking, then, at the scale of charges, as reformed by the company in pursuance of the judgment of this court on the former motion, I see no reason for thinking
*179] that there *has been any design on their part to evade compliance with the injunction, or to give the Peterborough dealers an undue advantage at the expense of those of Ipswich; and therefore I agree with my Brother Williams that this rule must be discharged with costs.

WILLES, J.—I am of the same opinion. Assuming that the average cost of preparing and starting a train-load of 200 tons or 35 trucks of coal is 2*s.* 5*d.* per ton, as is sworn to on the part of the company, and not controverted on the part of the complainants, the latter have failed to make out that the cost with the mileage (which is admitted to be correctly charged) would make a tonnage-rate less than the charges of which they complain. Unless they establish this,—and they certainly have not done so,—they have no locus standi; and consequently they must bear the usual penalty of an unsuccessful experiment, by having their rule discharged with costs. Rule discharged, with costs.

*WARNER, Appellant, RIDDIFORD, Respondent. *Feb.* 12. [*180

The defendant, the owner of a beer-house, placed the plaintiff therein to carry on the business as his servant at weekly wages, with an agreement for a *month's* notice to determine the service. Having given him a *week's* notice, the defendant made up the account and required the plaintiff to pay him the balance; and, on the plaintiff's refusal to accede to this request, on the ground that he had not received the stipulated month's notice, the defendant brought in a superintendent and a serjeant of police, one of whom, on the plaintiff's attempting to go up stairs, refused to permit him to do so, and ultimately only allowed him to go accompanied by an officer. After some further altercation about the money, and the plaintiff's again refusing to hand it over at the request of the superintendent, the latter asked the defendant if he should take him: it did not appear what answer the defendant made, but the officer took the plaintiff into custody, and entered a charge of embezzlement against him at the station-house, and afterwards carried him before the magistrates, by whom he was discharged.

In an action in the county court for the false imprisonment, the judge told the jury that there were three questions for their consideration,—first, whether there was any imprisonment,—secondly, by whom it was committed,—thirdly, whether there was any legal ground for it. Upon the first point, he told them that "to constitute an imprisonment, it was not necessary that the person should be locked up within four walls, but that, if he was restrained in his freedom of action by another, that was an act of imprisonment, and that the way in which the plaintiff had been constrained *in his own house* and the restraint put upon his person by refusing him permission to leave the room and go up stairs *in his own house*, was in itself an imprisonment, independent of his being conveyed before a magistrate;" upon the second, "that, if they found the defendant was the moving party in causing the imprisonment, he was responsible for it;" and, upon the third, "that the plaintiff, *as tenant* or *as lawful occupier, under an agreement not then terminated*, of the premises, was not legally liable to be ejected by compulsion and without notice, and that, if he refused to leave the house, the defendant could only eject him by adopting the proper legal proceedings to obtain possession, and that there was no evidence whatever to support or justify the charge of embezzlement."

The jury having found for the plaintiff,—Held, upon an appeal, that, although the latter part of the summing-up (which seemed to assume that there was a tenancy or quasi tenancy) was somewhat inaccurate, it did not amount to a misdirection in point of law.

Semble, that the county court judge has (under the 15th section of the 13 & 14 Vict. c. 61, and the 145th of the rules of practice issued under the authority of the 19 & 20 Vict. c. 108, s. 32) no power to alter or add to an appeal case after it has been agreed on and signed by the parties or by their attorneys.

THIS was an action brought to recover damages as stated in the particulars of the plaintiff's claim, "For that the defendant assaulted the plaintiff and imprisoned and detained him in prison without any reasonable or probable cause."

The cause was tried (with a jury) in the county court of Wiltshire holden at Swindon, on the 10th of November, 1857.

The first witness for the plaintiff was the plaintiff himself. He stated, that, in the beginning of the year, the defendant, who kept a beer-house at New Swindon, proposed to him to come and manage his business there, offering to pay him as wages 30*s.* a week, or 6*l.* per month,—a month's notice to be given *either way; which offer was accepted by the p ntiff, and he accordingly came to New Swindon in April last. [*181

further stated, that, on the 9th of September last, the defendant rner) had said that he could not pay him the wages he had hitherto ; and that, after some discussion, the defendant offered the plaintiff week, which the plaintiff refused. "We had," said the plaintiff, nain bother." He further stated that the defendant and his wife under his roof; that, on the morrow morning, the defendant gave week's notice to leave his service; that he (plaintiff) merely smiled, and said "thank you;" that, on the following Wednesday, the 16th of

September, the defendant and his wife drove up; that he then told the defendant that he should take no notice of the week's notice which the defendant had given him; that the defendant and one Monk went into the cellar at six o'clock, and the defendant called the plaintiff to take stock; that the plaintiff refused to have stock taken that night; that they had a regular bother; that the plaintiff requested Monk to come the following morning, when he said he had promised the defendant to do so; that defendant and his wife slept there that night; that, on the next day, plaintiff was engaged in making up the books, when the defendant came in with one Vallis; that plaintiff went through with defendant and Vallis in the cellar, and when they came out they began to take account of glass and cigars; that the keys were in the till; that defendant and Vallis went up stairs to cast up accounts; that they did not call upon plaintiff to know what money he had in hand; that they went out, and he remained as usual; that, between five and six o'clock, defendant and Vallis came back with the police superintendent and serjeant; that many persons were about; that plaintiff put the keys of the till in his pocket, saying *they were his yet; that the superintendent said they were come for plaintiff to give up defendant's money, and that plaintiff then said, "Very well; if Warner will give me warning, I'll go on the 12th of October, but, if this is not done, I'll stick to what I've got;" that Mr. Haynes (the superintendent) then said, "Now, Mr. Warner, you are at liberty to break open anything there is in the house;" that, as Warner was going towards the till, as plaintiff thought, to break it open, he (plaintiff) said, "You need not do that, here's the keys;" that defendant pulled out of his pocket a receipt for five weeks, and said, "Thee beest only a weekly servant, and I'll give thee a week's wages, and no more;" that plaintiff then gave them the keys of the till; that they took out the money; that plaintiff's wife, with the superintendent and defendant, went up stairs, and, when they came down, plaintiff was called into the parlour and asked for 30*l.* 0*s.* 9*d.*; that plaintiff said he would not give it without his right, his month's money; *that the serjeant watched the plaintiff, and would not allow him to go up stairs;* that plaintiff went to see his child; *that he said to the superintendent, he hoped, if he was in custody, he would permit him to go and change his clothes;* that one Bullock (the officer) went up with the plaintiff; *that the superintendent took him to the station-house; that he was in the station-house three hours, and at nine at night was taken before the magistrate and bailed;* and that Bullock, the officer, and Haynes, the superintendent, were there. The plaintiff further stated, that, *on the 24th of September, he attended before the magistrate again,* with Mr. Browne his solicitor; that Mr. Browne, who appeared for him, opened the case; that Haynes, the superintendent of police, said defendant did not wish to press the case; *that the magistrate said there was no case against him, and he was discharged;* that *he paid Mr. Browne 1*l.* 11*s.* 6*d.*, witnesses, 10*s.*, and summons, 8*s.*; that, on the Saturday following, defendant wanted him to go to his lawyer's to have a receipt for the money he had paid, viz., 30*l.* 0*s.* 9*d.*, deducting the 6*l.* for his month's wages, and leaving 24*l.* 0*s.* 9*d.*; and that he wished him to go back at 1*l.* per week, which plaintiff refused.

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On cross-examination, the plaintiff stated, that, on the 9th of September, he and defendant had a main bother; that defendant told him

to give up the money to Mrs. Warner, and that he (plaintiff) refused; that the stock had been taken; that, on the 9th of September, the defendant said he could not afford to give plaintiff more than 1*l.* a week; that, on the 16th he (plaintiff) refused to let stock be taken; that he did not recollect swearing that night; that next morning Vallis and defendant came again, and plaintiff went round the cellar with them; that Vallis did not immediately ask for money, not until plaintiff was called upon for 30*l.* 0*s.* 9*d.*; that that was after they had taken the cash from the till; that plaintiff produced an account for certain small moneys; that he claimed 6*l.* for a month's wages; that Vallis never said he should require a receipt for four weeks; that, in the evening, they said he wanted 30*l.* 0*s.* 9*d.*, and plaintiff said "Very well, give me my month's wages, and you may do what you like;" that Haynes (the superintendent) said defendant was at liberty to break open the locks in the house; that *plaintiff did not hear defendant or any one else tell the police officer to take him* (*plaintiff*) *into custody;* that four friends came to him (plaintiff) at the station-house, and he had a talk that night about an action for false imprisonment; that Haynes advised him to give up the money, and he refused; that he did not say he "would not give up the money;" that he went to Mr. Browne when he was *liberated on bail; and that the charge was entered on the sheet as "embezzlement." [*184

Millicent Riddiford, wife of the plaintiff, said that she was present at the agreement between her husband and defendant; that there was to be a month's notice given either way; that she was present when the police officer came, and when her husband went away, and when he (the officer) went up stairs; that plaintiff wanted to go up stairs, and they would not let him; that they searched the room and boxes, and left the things as they were, scattered about; that there were many persons about; that she heard them ask for the money, and her husband said, provided they gave him his month's wages, he would give it up.

On cross-examination, the witness said that she unlocked the boxes; that she would not give them the keys; that they found some small coin belonging to the little girl; that Haynes, the superintendent, asked Warner (the defendant) whether he was to take Riddiford, the plaintiff, and that she did not hear any answer by defendant; and that her husband was taken off by Bullock.

John Short said that he had taken stock, being employed by defendant, and that plaintiff was never unwilling to pay over the money; that, previous to the 10th of April, defendant said to him, "I have a man coming from the country: I have made an arrangement that I can get rid of him at any time at a month: that is our agreement."

Edwin Monk said that he remembered the 9th of September, and the parties coming to his house; that defendant said to plaintiff, "I give you a week's notice;" that plaintiff said nothing at the time, but afterwards, when defendant was gone, said something about a month's notice.

The counsel for the defendant thereupon submitted *to the court that there was no evidence to go to the jury of the plaintiff's alleged causes of action. The judge was of opinion that there was, and thereupon the following witnesses were called for the defendant:— [*185

Henry Edward Haynes, the superintendent of police of the district, said, that, on the 17th of December, he went to defendant's premises

between five and six o'clock. Mrs. Riddiford, the plaintiff's wife, was in the bar: she called her husband. Witness said defendant had called him to settle some dispute between them. He asked plaintiff to give up the keys. He said to defendant, "You are quite at liberty to break open your own locks." Riddiford was asked for the money, about 30*l.* He said he should not give it up on a week's notice. Witness said to plaintiff, "You are liable to be turned out at a minute's notice." We went up and searched: we found 6*d.* He advised Riddiford, the plaintiff, to give up the money: the plaintiff said, "Never, unless he went before a magistrate." Witness said, "You know the consequence." He said, "Yes, I shall go to Devizes." He kept repeating that he would never give up the money till he had been before a magistrate. Plaintiff went out with Bullock (the officer) near an hour afterwards. Witness followed, and said, "This is very foolish." Plaintiff said, "I never will give up the money until going before a magistrate." Witness directed Bullock to take him into custody. Witness took him before Mr. Goddard, and got him liberated upon bail. When defendant came to witness, he said that plaintiff would not leave the house, and he wanted him (witness) to eject him from the house. Witness took Bullock with him.

Cross-examination. [The charge-book was called for and produced, and the witness was desired to read the entry relating to this transaction, from which it appeared that the plaintiff was charged by Warner *186] *with embezzlement, and that the witness in support of the charge was Haynes.] The witness admitted that the entry was in his handwriting. He further said that *Warner did not make any direct charge of embezzlement;* but, as plaintiff was bound to appear on the 24th, and witness then expected Warner would be present and prefer the charge, he entered it in the charge-book. He was then asked, should he have laid the charge before the magistrates if Mr. Warner had not charged Riddiford with embezzlement; to which he answered, "*I put Warner's name as a matter of course.*" He was then asked if the entry was true; to which he also answered, "Yes." He further added, "Warner, the defendant, fetched me to the house." I gave plaintiff into custody to Bullock. Bullock before that had gone up stairs. I did not allow plaintiff to go up stairs, because I thought he would secrete money up stairs. Plaintiff said he would not leave without a month's notice. The account was made out in my presence. He admitted the correctness of the account, but refused to deliver it.

Bullock, the police officer, said, that, on the 17th of September, he accompanied the superintendent. He did not hear Warner give any direction. Haynes said to plaintiff, "You had better give up the money." He said, "I'll do no such thing, unless I have my month's wages."

The defendant, Warner, was then examined. He stated that he engaged plaintiff at 30*s.* per week as a weekly servant; that accounts were rendered satisfactorily until the last week; that he came and took stock on the 9th of September, and then gave notice that he should reduce the wages to 1*l.* per week; that, on the following morning, he gave the plaintiff a formal notice; that he (plaintiff) said nothing about being a monthly servant; that, on the 16th of September, defendant *187] *went to the premises, and plaintiff would not allow him to take stock; that, on the next morning, he (defendant) went to Haynes;

that Haynes came about six o'clock; that Vallis took stock, the items of the account being agreed to by Riddiford; that defendant took Haynes to give him possession of the house; that he heard Haynes apply for the money; that plaintiff refused, and then Haynes took him in custody.

On cross-examination, defendant said that he remained in the beer trade; that he had got a person at 24*s.* a week; that he fetched Haynes to give him possession; that he slept at the house the night before; that plaintiff said nothing about notice; and that he (defendant) did not authorize Haynes to take plaintiff.

Edward Vallis said that plaintiff put in a claim for a month's wages; that a balance was struck, and entered on Warner's book by him; that the claim for 6*l.* did not appear in the account; that he (witness) applied to plaintiff for the money, which he refused; and that he accompanied plaintiff to the police-station.

In summing-up, the judge stated to the jury that the first question for them was,—Was there any imprisonment? And he told them, that, to constitute an act of imprisonment, it was not necessary that the person should be locked up within four walls; but that, if the person was constrained in his freedom of action by another, that was an act of imprisonment; that the way in which the plaintiff had been constrained in his own house, and the restraint put upon his person by refusing him permission to leave the room and go up-stairs in his own house, was in itself an imprisonment, independent of his being conveyed before a magistrate; and that there was an act of imprisonment of some duration, there could be no doubt either in fact or law.

The judge then told the jury that they would next *have to consider, by whom was the imprisonment. And he directed them, that if, in doing this, they found that the defendant was the moving party in causing the imprisonment, he was responsible for the act so caused; and that they would, he thought, have but little difficulty in arriving at the conclusion that there had been an imprisonment, and that such imprisonment was caused by the direct act of the defendant. [*188

The judge stated that the next question for the jury was,—Was the imprisonment legal or illegal? And he directed them that there were two grounds upon which it was argued that the arrest and detention of the plaintiff was justifiable, and legal,—first, that he was merely the servant of the defendant, and that, refusing to deliver over the money of his employer, and to quit his house, it was lawful to eject him by force,—secondly, that he was guilty of embezzlement, and lawfully taken and held in custody on that charge. Upon these points, the judge's observations were to the effect,—first, that the plaintiff, as tenant, or as lawful occupier (under an agreement not then terminated) of the premises, was not legally liable to be ejected by compulsion and without notice; and that, if he refused to leave the house, the defendant could only eject him by adopting the proper legal proceedings to obtain possession,—secondly, that, as to embezzlement, there was no evidence whatever to support or justify the charge.

The jury having retired to consider their verdict, the counsel for the defendant took exception to the judge's direction to the jury, and pointed out the alleged misdirection relied upon by the defendant, and hereinafter set out as his second and third grounds of appeal.

The jury found for the plaintiff, and judgment was given accordingly.

*189] *A notice of appeal was in due time served on the plaintiff,—the grounds of appeal being,—first, that the judge was wrong in ruling that there was evidence to go to the jury of the causes of action insisted on by the plaintiff,—secondly, that the jury were misdirected, in being told that the plaintiff was imprisoned in his own house when prevented from going up-stairs,—thirdly, that the jury were misdirected when told that the plaintiff was tenant, and that the defendant should have taken proper legal proceedings to obtain possession.

Subsequently to the notice of appeal being given by the defendant, the defendant, by his attorney, on the 30th of November, 1857, gave a notice of an application to be made to the judge at the then next court, for a new trial, on the grounds of misdirection and excessive damages.

At the next court, the case of appeal was tendered to the judge, by the defendant's counsel, to settle and sign; and he refused to settle or sign the case for the appeal, until the motion for a new trial was disposed of. The counsel for the defendant said he would abandon the ground of misdirection, and move on the ground of excessive damages alone. It was objected by counsel for the plaintiff that the defendant should not be heard in support of his motion for a new trial, until he abandoned his notice of appeal, or unless the motion was adjudged by his Honour to be of itself an abandonment and virtual supersession of the notice of appeal.

The judge said he was ready to hear the application for a new trial, considering the other notice for the appeal was not before him; and he declined taking cognisance of the notice of appeal until the motion for a new trial was either disposed of or withdrawn.

*190] The defendant's counsel, as he said, under protest, and still contending that he had a right first to call on *the judge to settle and sign the case of appeal, then moved for a new trial, on the ground of excessive damages, which the judge, after hearing the plaintiff's counsel, refused, with costs; after which, the defendant's counsel again tendered the case of appeal to be settled and signed, and the judge ordered that a case should be agreed on by the attorneys for the plaintiff and defendant, and should be forwarded to him in the event of their not agreeing, and, in the mean time, and until the next court, he would consider whether he could sign the case or not.

The case was accordingly settled and agreed to by the respective attorneys, and signed by the judge, who added thereto the following observations:—

"By the rules of practice in county courts (rule 145), the judge is required to sign a special case in appeal from his decision or summing-up, when agreed upon by the litigant parties or their attorneys. I have accordingly signed the above case.

"But I respectfully submit to Her Majesty's court having cognisance of this appeal, that, unexplained, the judge's signature would be taken to signify his approval and adoption of the statement. In the present instance, the consequence would be that I should stand committed to statements of my own judicial language and conduct which are defective and erroneous, and which (it is possible, at least), if left without correction, might affect the issue of the appeal. I therefore wish to append to my signature the following statement:—

"In summing up, I directed the jury that the points for their consideration were,—first, was there any imprisonment?—secondly, by whom was the plaintiff imprisoned?—thirdly, was the imprisonment lawful or unlawful? As to the first point, I stated, that, to constitute imprisonment, it was not necessary that the party should be locked up within four walls; that, if *he were controlled or restrained in his freedom of action by another, that was an act of imprisonment; that, accordingly, preventing the plaintiff leaving the sitting-room and going up stairs to his bed-room, might itself be held to be an imprisonment; but that it was unnecessary to dwell upon that, as it was not disputed that the plaintiff had been taken to the police-station, and detained in custody several hours, until he found bail for his appearance in a court of criminal judicature to answer a charge of felonious embezzlement. [*191

"As to the second point, I told the jury that, if they found that the defendant was the moving party in causing the imprisonment, he would be responsible for the act so caused.

"As to the third point, I commenced by saying, that '*as tenant*,'—but, upon the counsel for the defendant interposing the words '*not tenant*,'—I added, 'If not strictly tenant, yet as legal occupier under an agreement not then terminated, and which entitled him to either a week's or a month's notice,' he was not liable to be forcibly ejected; and that if the defendant wished to obtain possession, he should have resorted to legal measures for that purpose; that, as to the charge of embezzlement, upon which he had been taken before the magistrates and held to bail, it was entirely unsupported by evidence.

"At the next court, after the motion for a new trial had been heard and refused, a special case was handed to me, not to settle and sign, but as an agreed case to be signed only; and, as the business in hand did not admit of my then reading it, I proposed to take it home with me for that purpose; to which the parties by their attorneys readily assented. Some alterations were afterwards made, but not to the extent required; and the case was then transmitted to me in its present form for my signature."

**Kingdon*, for the appellant.—The statement appended by the county court judge cannot be looked at as part of the case. He might have declined to sign the case if presented to him in a form of which he might reasonably disapprove: but, having signed it, his duty was completely done. The 15th section of the 13 & 14 Vict. c. 61, enacts that the appeal "shall be in the form of a case agreed on by both parties or their attorneys, and, if they cannot agree, the judge of the county court, upon being applied to by them or their attorneys, shall settle the case and sign it." [WILLIAMS, J.—It has been thought that the judge has no discretion if the parties agree on a case.(*a*) I cannot conceive that to be so. WILLES, J.—It is the 145th rule, and not the statute, that requires the judge to sign the case as settled by the parties or their attorneys. WILLIAMS, J.—It may in the result become unnecessary to consider this. Take the case without it.] The judge was clearly wrong in telling the jury that there was any evidence of an imprisonment of the plaintiff by the act or procurement of the defendant. [*192

(*a*) See Furber v. Sturmey, 3 Hurlst. & N. 521.†

[WILLIAMS, J.—Was there not evidence that he set the police in motion?] It is true that the defendant brought the superintendent to the house; but that was for the purpose of obtaining possession of the house. [CROWDER, J.—And of the money.] There was no evidence upon the plaintiff's case, that the act of Haynes in taking him into custody was authorized by the defendant, or that he was in any way party to it. [WILLIAMS, J.—It appears upon the plaintiff's evidence that he was denied (by the police, in the defendant's presence) permission to go up stairs, when he refused to give up the balance claimed of him. Then, the plaintiff's wife afterwards hears the superintendent ask the defend-
*193] ant if he shall take the plaintiff *into custody. She does not hear the answer: but the plaintiff is taken away and charged with embezzlement. Surely that was evidence for the jury.] That must be taken in conjunction with what the defendant himself swears, viz., that he did not authorize the superintendent to take him: and in this he is corroborated by the superintendent, who says that the defendant did not attend at the station, or make any direct charge. [CROWDER, J.—He brings the police: he sees all that is done, and is silent. It was a fair question for the jury who was the moving cause.] In Brown *v.* Chapman, 6 C. B. 365 (E. C. L. R. vol. 60), the plaintiff went voluntarily before a police magistrate to meet a charge of embezzlement which was there about to be made against him by the defendant: the magistrate declining to entertain the matter, unless a charge were formally made, the defendant said, "Well, then, I charge him with embezzling 30*s.*:" the plaintiff was then ordered by one of the constables in attendance to go into the dock. [CROWDER, J.—That is a very different case. There was no trespass there by or under the authority of the defendant.] If the evidence of the plaintiff's wife, followed by the arrest, had stood unexplained, there might have been a case for the jury: but, her evidence being in itself ambiguous, and that ambiguity being removed by the evidence of Haynes, who stated that he never was authorized by the defendant to act as he did, there was nothing to submit to the jury upon which they could reasonably act. The second objection to the summing up was clearly a valid one, and was a matter that must very materially have enhanced the damages.(*a*) The jury were told that the plaintiff was imprisoned *in his own house* when prevented from going up stairs.
*194] [WILLIAMS, J.—If your *first point fails, surely there was a continuous imprisonment by the policeman throughout.] The plaintiff did not occupy the house as tenant: he was there merely as a servant, and might have been turned out at any moment. [WILLES, J.—The judge did not mean to say that the relation of landlord and tenant subsisted between the parties: and, though it is true that the plaintiff might have been turned out of the house at any moment, the defendant by so doing would have been guilty of a breach of his contract, in an action for which the jury would certainly have given the same amount of damages as if he had really been tenant.] At all events, the judge was wrong in telling the jury that the plaintiff was tenant, and that the defendant should have taken proper legal proceedings to obtain possession of the house. [WILLIAMS, J.—There was certainly some inaccuracy in that: but it was altogether an irrelevant matter: the jury could

(*a*) The case does not state the amount of damages. It was stated, however, that they were 50*l.*

not possibly have been diverted by it from that which was the real substance of the case.] It had a direct and evident tendency to inflame the damages. [WILLES, J.—You might have some ground of complaint, if we could see that the jury gave damages in respect of the expulsion. WILLIAMS, J.—It was not such an erroneous statement of the law as to amount to a misdirection. BYLES, J.—The judge evidently speaks of an occupation in the popular sense, and not of a strict legal occupation as tenant.] The jury are told that the plaintiff had such a legal right to the possession of the house as to make the act of preventing him from going up stairs an imprisonment. [WILLIAMS, J.—Upon consideration, we think we should not be doing justice to the learned judge not to look at the explanation which he has appended to the case. If you have anything to object to that course, we will hear it.] The right to appeal is given by the 14th section of the 13 & 14 Vict. c. 61; [*195 *and the 15th section enacts "that such appeal shall be in the form of a case *agreed on by both parties*, or their attorneys, and *if they cannot agree, the judge of the county court*, upon being applied to by them or their attorneys, *shall settle the case and sign it.*" The 145th of the rules made under the authority of the 19 & 20 Vict. c. 108, s. 32, provides that "*all cases* on appeal shall, unless the judge shall otherwise order, be presented to him for signature at the court holden next after the expiration of twelve clear days from the day on which judgment was pronounced, and shall then be signed by the judge, and be sealed with the seal of the court; and, when signed and sealed, one copy thereof shall be deposited with the registrar, and another sent, by post or otherwise, by the appellant, to the successful party within three clear days next after the time of signing and sealing the same; and, if the appellant do not comply with this rule, the successful party may proceed on the judgment, unless the judge shall otherwise order." The *rule* requires the judge to sign *all* cases; but the statute only authorizes him to *settle* the case *if the parties cannot agree.* [BYLES, J.—Suppose two ignorant persons choose to agree upon a case, and incorrectly represent the judge's summing up, is he nevertheless bound to authenticate it by his signature?] Probably not. [BYLES, J.—Does it matter where his signature is put,—whether before or after the additions?] It is submitted that he has no right to make alterations or additions to a case which the parties have agreed on in the absence of the parties. A judge of one of the superior courts never settles a bill of exceptions or a special verdict without having the parties before him.

Gray, contrà.—The fair meaning of the statute and the rule, taken together, is, that the judge shall be the party who is to inform the court as to what are the *facts of the case, and what was his direction [*196 to the jury. Manifest inconvenience would result from a contrary course.

WILLIAMS, J.—We have great difficulty in seeing how we can look at the supplemental statement added to the case by the county court judge after it has been agreed to and signed by the parties or their attorneys. But we entertain some doubt whether as the case stands without it there was not some misdirection.

Gray.—The defendant was clearly responsible for the whole imprisonment. The plaintiff never was asked to leave the house: the object of the defendant evidently was, to restrain the plaintiff's freedom there, as

a means of compelling him to produce the money. There was nothing to show that the plaintiff did not continue lawfully possessed of the house until he left it in custody. Assuming that there was some slight inaccuracy in what the judge said upon that point, it has no substantial bearing upon the case, and could not in any degree have influenced the minds of the jury. It seems to have been assumed that the imprisonment was all one; and in substance it clearly was so. What the jury are told substantially amounts to this, that, in order to constitute an imprisonment, it is not necessary that the party shall be kept within four walls: but that it is enough if he is restrained in his freedom of action. Without, therefore, adopting the whole of Lord Denman's opinion in Bird *v.* Jones, 7 Q. B. 742 (E. C. L. R. vol. 53), there clearly was abundant evidence here from which the jury were warranted in inferring that the plaintiff had been imprisoned, and that by the act and procurement of the defendant.

*197] *Kingdon*, in reply.—If the legislature had intended *that the judge of the county court should have control over the case though agreed to by the parties, they knew how to say so. By the 42d section of the 6 & 7 Vict. c. 18, it is provided that, where a party is dissatisfied with the decision of the revising barrister, and gives notice that he is desirous to appeal, the revising barrister "shall state in writing the facts which according to his judgment shall have been established by the evidence in the case, and which shall be material to the matter in question, and shall also state in writing his decision upon the whole case, and also his decision upon the point of law in question appealed against;" "and the said barrister shall read the said statement to the appellant in open court, and shall then and there sign the same." There was no evidence of any imprisonment of the plaintiff by the defendant. All that was done that could be construed to amount to an imprisonment, was done by the superintendent. [Byles, J.—The refusal to permit the plaintiff to go up stairs was an instance of the general restraint of his person brought about by the act of the defendant.] There is no complaint that the plaintiff was not permitted to leave the house. [Willes, J.—It is obvious that the plaintiff would not have been permitted to leave the house without giving up the money.]

Williams, J.—I am of opinion that our judgment must be for the respondent. The case involves a question of no little importance, viz. as to how far we can look at the protest or appendix which the county court judge has annexed to the case he has signed. It is unnecessary to give any opinion whether he was bound to sign the case or not. Looking at the statute, it is difficult to avoid coming to the conclusion, that, when the attorneys for the respective parties have agreed upon

*198] what was the case at the trial, and have ratified that *agreement by affixing their signatures to the document by force of the statute and the rule, the judge is bound to put his signature to it also. It is unnecessary to determine whether or not the judge is bound to sign a case which grossly misrepresents that which took place at the trial. But, where the judge has signed a case so prepared and agreed upon by the parties, I think we are not at liberty to look at any additions or explanations which he may think fit to make to the case, but must look only at that which appears above his signature. So looking at this

case, it seems to me to be impossible to doubt that the learned judge in presenting the case to the jury, in some respects inaccurately stated the law. But the question is whether these inaccurate statements of the law bore so directly upon the important points which were before the jury and upon the law which was to guide them in coming to a conclusion as to amount to a wrong direction in point of law, and induce us to send the case down again. I am of opinion that these inaccuracies are not of such a nature as to constrain us to take such a course. It appears to have been objected by the defendant's advocate, at the close of the plaintiff's case, that there was no evidence to go to the jury. The judge, however, was of a different opinion, and the defendant's case was gone into. In his summing up, the judge told the jury that the first question for their consideration was, whether there had been any imprisonment: and then he proceeds to say, that, "to constitute an imprisonment, it was not necessary that the person should be locked up within four walls, but that, if he was constrained in his freedom of action by another, that was an act of imprisonment; that the way in which the plaintiff had been constrained in his own house, and the restraint put upon his person, by refusing him permission to leave the room and go up stairs in his own *house, was in itself an imprisonment, independent of his being conveyed before a magistrate; and that there was an act of imprisonment, and a continued imprisonment of some duration, there could be no doubt either in fact or law." [*199 In substance, the judge leaves it to the jury to say whether there is anything in the objection urged on the part of the defendant, that there had been no imprisonment. He goes on to lay down the law generally, and to illustrate his meaning by reference to the facts and the conduct of the parties,—the refusal (the policemen being present) to permit the plaintiff to go up stairs lest he should hide the money, coupled with the charge before the magistrate,—all of which seems to have been sanctioned by the defendant. I cannot see that there has been any misdirection upon this point: and I agree with the learned judge that there was beyond all doubt an imprisonment. The next question left, was, by whom was the imprisonment; and the jury were told, that, "if they found that the defendant was the moving party in causing the imprisonment, he was responsible." Upon this point, the question is whether there was not some evidence to connect the defendant with the restraint put upon the plaintiff's person, and his subsequent detention and conveyance before the magistrate. I think there was. The defendant himself says he took the superintendent to give him possession of the house. That he first put the police in motion, therefore, is clear. Then it appears from the evidence of the plaintiff's wife, that the plaintiff refusing to give up a sum of money which was claimed by the defendant, the latter was asked by the superintendent whether he was to take the plaintiff. It does not appear what the answer given was: but the fact is, that the policemen do take the plaintiff into custody, professing to act at the instigation of the defendant, upon a charge of embezzlement. *Now, it is obvious that the duty of the police was not to take the defendant into custody unless charged with an offence. I therefore think there was abundant evidence of the defendant's having sanctioned their proceedings; and that the judge was right in leaving that to the jury. The remaining objection [*200

is, that the judge misdirected the jury in reference to the defendant's justification. After stating that two points were urged on the part of the defendant,—first, that the plaintiff was merely his servant, and that his refusal to deliver over the money of his employer, and to quit his house, rendered it lawful to eject him by force,—secondly, that the plaintiff was guilty of embezzlement, and lawfully taken and held in custody on that charge; the judge proceeds to observe, upon the first, that the plaintiff, as tenant, or as lawful occupier under an agreement not then terminated, of the premises, was not legally liable to be ejected by compulsion and without notice, and that, if he refused to leave the house, the defendant could only eject him by adopting the proper legal proceedings to obtain possession; and, as to the second, he tells the jury that there was no evidence whatever to support or justify the charge of embezzlement. The first ground clearly affords no defence to the action. We must now assume that the defendant was guilty of false imprisonment; and the question is whether he had anything to urge in defence. It clearly was no answer to say that the plaintiff was in possession of his house, and refused to quit; and, though the judge in his summing up treats that part of the case somewhat inaccurately, I do not think that amounts to a misdirection. The substance of the defendant's contention was, that the plaintiff had brought the charge upon himself by his refusal to give up possession of the premises, and to pay over the balance claimed. The judge, in answer to that, says that the plaintiff was not *201] *in the wrong. It certainly was not quite accurate to say that the plaintiff had a right to keep possession; and it would be wrong in the jury to give effect to that: but still I do not think it was such a misdirection in point of law as to justify us in sending the case down to a new trial.

CROWDER, J.—I also am of opinion that our judgment must be for the respondent. The first question is, whether or not we are justified in looking at that which the judge has annexed to the case after the signature. I am clearly of opinion that we are not. When the 15th section of the 13 & 14 Vict. c. 61, and the 145th rule, are looked at, it seems to me to be clear, that, where the parties agree upon a case and sign it, all that remains for the judge to do, is, to attach his signature in order to authenticate it as the document which is to be brought before the superior court. Having signed the case here, all that the judge has subsequently added amounts to nothing. Then, looking at the case as settled and agreed to by the parties, the matter for our consideration is, whether or not the jury were misdirected. The alleged misdirection was threefold,—first, in ruling that there was evidence to go to the jury in support of the plaintiff's cause of action,—secondly, in telling the jury that the plaintiff was imprisoned in his own house, when prevented from going up stairs,—thirdly, in telling them that the plaintiff was tenant, and that the defendant should have taken proper legal proceedings to obtain possession. Now, was the defendant the moving cause of the plaintiff's imprisonment? I think there cannot be any reasonable doubt that he was the author of it. He goes to the premises with a superintendent and a serjeant of police, his object evidently being to get the money. The plaintiff, conceiving that he is entitled to a month's *202] notice, refuses to *give up the money. He is at this time in a room with the two police officers, and wishes to go up stairs, but

is prevented from doing so, and ultimately only permitted to go accompanied by a policeman. The wife hears the superintendent ask the defendant if he is to take the plaintiff into custody; but she does not hear the answer. The plaintiff, however, is carried to the station-house, and afterwards before a magistrate, and a charge of embezzlement made against him. The whole was one transaction: and I think there was ample evidence whence a jury might fairly conclude that the defendant was the author of the imprisonment. That there was some imprisonment, is clear: but it is said that the judge was wrong in telling the jury that the mere restraining the plaintiff from going up stairs amounted to an imprisonment. We must, however, look at all the circumstances to which the summing up has reference. It seems that the plaintiff was not allowed to go up stairs without a policeman. The judge tells the jury that that constitutes an act of imprisonment: and that is very like what is said by Patteson, J., in Bird *v.* Jones, 7 Q. B. 742 (E. C. L. R. vol. 53). He was dealing with a portion of the imprisonment. Then it is said that the judge further misdirected the jury, in telling them that the plaintiff was imprisoned in *his own house.* In one sense it *was* his own house whilst he was in it: and it can hardly be doubted that he would equally have been restrained from quitting the house without first giving up the balance claimed. I therefore think the judge was right also in that. But, so far as regards the statement that the plaintiff was tenant, I think the learned judge was mistaken. The plaintiff had no right to remain in the house a moment after the defendant chose to order him to quit. But what the judge really meant, was, that the defendant had no right to rely upon this as a justification, because he *would be breaking his agreement. Then it is urged [*203
that the damages might have been enhanced by this incorrect way of presenting the case to the jury. I cannot, however, see how that could be so. The complaint in substance is, that the plaintiff was arrested and taken before a magistrate upon an unfounded charge of embezzlement. That is a grave charge, and one which would well warrant a jury in giving very considerable damages. Upon the whole, I see no sufficient ground to justify us in sending the case down to a new trial, and therefore the respondent must have judgment.

WILLES, J.—I am of the same opinion. There are, undoubtedly, some expressions in the course of the summing up which taken by themselves could hardly be justified. It would, however, be unfair to apply a strict construction to those expressions, when it is considered that they are remarks made in reference to the facts. The judge took a strong view in favour of the plaintiff, in consequence of the breach of agreement by the defendant; and it was in reference to that the expressions complained of were used. The first statement of law which is objected to, is, as to whether or not there was an imprisonment of the plaintiff in his house,—whether the imprisonment commenced when he was told that he could not go up stairs. I cannot doubt that the imprisonment did commence at or immediately after the time of the refusal to permit the plaintiff to go up stairs. It appears that the defendant wished to obtain a settlement of accounts with the plaintiff; and that a disagreement arising between them as to the notice the plaintiff was entitled to, and the plaintiff refusing in consequence to hand over the balance claimed by the defendant, the latter went away, and shortly afterwards returned

*204] *accompanied by two policemen. His object clearly was to intimidate the plaintiff. The superintendent demanded the money, and, upon the plaintiff refusing to part with it, on the ground that he had not received due notice, he is taken into custody and carried before a magistrate charged with embezzlement. It would be asking one to come to a conclusion quite contrary to one's common sense, to suppose that the police took upon themselves to arrest the plaintiff, and to enter such a charge against him, without being desired by the defendant to do so. Whilst in the house in a room with the two policemen, he was refused permission to go up stairs; and ultimately he seems to have been allowed to go, but accompanied by an officer. I think it is impossible that, upon these facts, any one can doubt that it was meant to be conveyed to the mind of the plaintiff that he should not go out of the presence or control of the officers. That in my opinion clearly amounts to an imprisonment. There is a great deal of learning in the books as to whether or not there can be an arrest and imprisonment without actually touching the party. In Arrowsmith *v.* Le Mesurier, 2 N. R. 211, it appeared that a warrant having been granted by a magistrate for apprehending the plaintiff upon a charge of a conspiracy to sue out a fraudulent commission of bankrupt, a constable went with the warrant to the plaintiff's house and showed it to him; that, after conversing some time with the constable, the plaintiff desired to have a copy of the warrant, which the constable permitted him to take, after which the plaintiff attended the constable to the magistrate, and, after being examined upon the subject of the charge, was dismissed, about six hours after the warrant was first shown to him; and that the constable never touched the plaintiff. The jury having found for the defendant, in discharging a rule for a new trial, *Sir J. Mansfield said: "I can suppose
*205] that an arrest may take place without an actual touch, as, if a man be locked up in a room;(*a*) but here the plaintiff went voluntarily before the magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the plaintiff. How can a man's walking freely to a magistrate prove him to be arrested? I think that the jury have done justice." I notice that case in order to express my dissent from the doctrine it lays down. It appears to me that the later case of Grainger *v.* Hill, 4 N. C. 212 (E. C. L. R. vol. 33), 5 Scott 561, states the law upon this subject more accurately. The facts of that case were shortly these:—In September, 1836, the plaintiff by deed mortgaged to the defendants for 80*l.* a vessel of which he was owner as well as captain. The money was to be repaid in September, 1837; and the plaintiff was in the mean time to retain the register of the vessel, in order to pursue his voyages. In November, 1836, the defendants, under some apprehension as to the sufficiency of their security, resolved to possess themselves of the ship's register, and, for this purpose, after threatening to arrest the plaintiff unless he repaid the money lent, they made an affidavit of debt, sued out a capias endorsed for bail in the sum of 95*l.* 17*s.* 6*d.* in an action of assumpsit, and sent two sheriff's officers with the writ to the plaintiff, who was lying ill in bed from the effects of a wound. A surgeon present perceiving he could not be removed, one of the defendants said to the

(*a*) See per Lord Hardwicke, in Williams *v.* Jones, Cas. temp. Hardw. 301.

sheriff's officers, "Don't take him away, leave the young man with him." The officers then told the plaintiff that they had not come to take him, but to get the ship's register; but that, if he failed to deliver the register, or to find bail, they must *either take him or leave [*206
one of the officers with him. The plaintiff being unable to procure bail, and being much alarmed, gave up the register: and the court held that this amounted to an arrest. Tindal, C. J., there said,—"Without actual contact, the officer's insisting that the plaintiff should produce the register, or find bail, shows that the plaintiff was in a situation in which bail was to be procured; that was a sufficient restraint upon the plaintiff's person to amount to an arrest. The authority in Buller's Nisi Prius, p. 62, goes the full length. 'If the bailiff who has a process against one, says to him, when he is on horseback or in a coach, *You are my prisoner, I have a writ against you;* upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process.'" In the present case, if the door of the room had been locked, nobody could doubt that that would have been an imprisonment. The defendant coming to the house with two officers, the plaintiff being there, and submitting to their control, it was the same as if he had actually been locked up in the room. That being the proper view of the facts, the judge observes that "the way in which the plaintiff had been constrained in his own house, and the restraint put upon his person, by refusing him permission to leave the room and go up stairs in his own house, was in itself an imprisonment, independent of his being conveyed before a magistrate." I think the judge must be considered as having here adopted the view of the case taken by the defendant's advocate: and, though it would have been more correct to have told the jury, that, if the substance of the transaction was that the plaintiff was restrained from leaving the room without permission or without the attendance of a constable, it amounted to an imprisonment, yet, giving a fair and reasonable *construction to the summing up, it seems to me that [*207
it is not open to exception. The judge does not profess to be laying down a principle, but rather to be discussing and explaining the law with reference to the facts of the case. The other exception to the summing up is, that the judge was wrong in telling the jury that the plaintiff had such an interest in the premises that he could not be turned out without recourse being had to the proper legal proceedings. In this respect, I think the judge was mistaken. The plaintiff was not in any sense tenant to the defendant. He might have been put out at any time. But it does not follow, that, because a judge in the course of his summing up lays down a wrong proposition, that there must necessarily be a new trial. This was not a matter by which the jury could have been misled, and therefore no ground for setting aside the verdict. With regard to the statement added to the case by the judge, I entirely agree with my learned Brothers that we ought not to look at it.

BYLES, J.—I am glad the court has been enabled to come to the conclusion that there ought to be no new trial in this case. It appears that the defendant was the owner of a beer-shop, and that he let the plaintiff in as his servant at certain weekly wages, subject to a month's notice. It may be that under this agreement the plaintiff was not in any sense the defendant's tenant. But, in popular language, he was

the occupier of the house; and it may be said to have been "his own house" whilst he so occupied it. The plaintiff would clearly have no right to continue in possession after the relation of master and servant between him and the defendant had been severed. But the observations of the judge are not to be scanned with the same strictness as on a bill of exceptions. In the first place, the *jury were told that the circumstances proved before them amounted to an imprisonment: and I am clearly of opinion that there was ample evidence of all the acts of imprisonment insisted upon. The second objection to the direction was, that the judge told the jury that the plaintiff was imprisoned, not by "being," but *when* prevented from going up stairs. I think, for the reasons given by my learned Brothers, and especially those given by my Brother Crowder, that there was abundant evidence that the plaintiff was imprisoned in his own house. As to the third point, it seems to me, that, in one sense, the direction was too favourable to the defendant. And, at the most, the judge was guilty of a mere inaccuracy of expression in a matter not at all affecting the damages which the jury would be likely to award upon a new trial. I therefore agree with the rest of the court in thinking that there should be judgment for the respondent. And I cannot help observing that the defendant was guilty of a very reprehensible abuse of criminal process for the purpose of enforcing a civil right. Appeal dismissed, with costs.

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"It is not necessary to constitute false imprisonment, that the person restrained of his liberty should be touched or actually arrested if he is ordered to do or not to do the thing, to move or not to move against his own free will, if it is not left to his option to go or stay where he pleases, and force is offered or threatened, and the means of coercion are at hand, ready to be used; or there is reasonable ground to apprehend that coercive means will be used if he does not yield. A person so threatened need not wait for its actual application. The submission to the threatened and reasonably to be apprehended force, is no consent to the arrest, detention, or restraint of the freedom of his motions—he is as much imprisoned as if his person was touched, or force actually used; the imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary, till all efforts at coercion or restraint cease, and the means of effecting it are removed:" Baldwin, J., in Johnson *v.* Tompkins, Bald. C. C. 601. And see Pike *v.* Hanson, 9 New Hamp. 491; Francisca *v.* State, 4 Zabriskie 30; Smith *v.* State, 7 Hump. 43; Blower *v.* State, 3 Sneed 66; Halliday *v.* State, 1 Barb. S. C. 137.

*209] *HYBART *v.* PARKER. *Feb.* 10.

It is not competent to the adventurers or shareholders in a cost-book mine to stipulate by their rules that unpaid calls shall be recovered as a debt due from the defaulting shareholder to *the purser.*

This was an action against a shareholder in a cost-book mine to recover calls.

The first count of the declaration stated, that, before and at the time

of the making of the several calls thereinafter mentioned, the defendant and others were adventurers and shareholders of and in a certain company of adventurers and shareholders for working certain mines, formed upon the cost-book principle, and called The East Birch Tor Tin Mining Company, and that, by the rules and regulations of the said company before and at the time of the making of the said calls and still in force for and agreed to by the defendant as such adventurer and shareholder and the other adventurers and shareholders therein, authority was and is given to the adventurers present at any general or special general meeting of the adventurers and shareholders of and in the said company, held pursuant to the said rules, to make any call or calls they might think neeessary for working the said mines, upon the said adventurers and shareholders in respect of their several shares therein; and that by the said rules and regulations it was and is further agreed that all calls should be paid into such bank as the committee for the time being appointed pursuant to the said rules for the management of the said company might direct, within fourteen days after such calls should have been made, and that, for the better enforcing payment of any call or calls made pursuant to the said authority, and found to be in arrear, the same should be considered, and was thereby declared to be, a debt or debts due from the shareholders or respective shareholders so in arrear *to the purser of the said company*, who should have power to recover the *same as a simple-contract debt or debts due to him from such defaulter or respective defaulters, by action at law in any or either of Her Majesty's superior or inferior courts; and that, upon the hearing or trial of any such action, the production of the register of shareholders in the cost-book, with the minute of the resolution making such call or calls so in arrear should be primâ facie evidence of the defendant in any such action being a shareholder, and of the call or calls being made: and that, in any such action, the defendant should not be at liberty to set up or plead a partnership with the purser as a defence: Averment, that, while the defendant and the said others were such adventurers and shareholders as aforesaid, and while the said rules were so in force and agreed to, three general or special general meetings of the said adventurers and shareholders were held, at each of which a call of a certain sum of money was duly made by the adventurers present, on the defendant and the other adventurers and shareholders of and in the said company, in respect of each of their shares therein, which said calls were severally thought to be necessary for working the said mines, by the said adventurers present at the said meetings respectively; and that, at the time of the making the said several calls, there was a committee appointed pursuant to the said rules, and that the said committee appointed a bank into which the said moneys were to be paid, and that notice was given to the defendant and the several adventurers for payment of the said moneys, and that the moneys due from the defendant in respect of the said several calls were unpaid and found to be in arrear, and that the plaintiff was the purser of the said company, and that all things had happened and been done necessary to entitle the plaintiff, as such purser, to have the said moneys paid him by the said defendant, and to maintain this action. [*210

*There were also counts for money payable by the defendant to the plaintiff for moneys found to be due from the defendant to [*211

the plaintiff upon accounts stated between them as such shareholder and purser respectively.

The defendant demurred to the first count. Joinder.

M. Smith, Q. C. (with whom were *Tapping* and *Kingdon*), in support of the demurrer.—This is an attempt on the part of the shareholders in a cost-book mine, without the aid of an act of parliament, to appoint a public officer to sue and be sued on their behalf: it is in effect a breach of the principle laid down by the House of Lords in Scott *v.* Avery, 5 House of Lords Cases 811, that parties cannot by contract oust the courts of their jurisdiction. There is no privity between the plaintiff and the defendant, and no consideration for the alleged promise. The intention was, that the calls should be recoverable by the individual who might happen to be purser at the time of the making of the call or at the time of bringing the action. In Pigott *v.* Thompson, 3 Bos. & P. 147, where A. agreed in writing to pay the rent of certain tolls which he had hired, "to the treasurer of the commissioners," —it was held that no action for the rent could be maintained in the name of the treasurer. Lord Alvanley there says: "The manifest intention of the agreement was, that the defendant should pay the money to any person whom the commissioners should choose to make their treasurer for the time being; but by law a debt is not so assignable." And Chambre, J., adds: "The contract is, to pay the commissioners through the medium of their officer."

The court called on,—

*212] *Collier*, Q. C. (with whom was *Prideaux*), to support *the declaration.—This is a question of vital importance to cost-book mining companies. They cannot have deeds of settlement, for that would be an abandonment of the cost-book principle; and it is impracticable for each company of adventurers to obtain an act of parliament. The only mode by which a recusant shareholder has hitherto been compelled to pay calls has been, by getting a creditor of the company to sue him. This declaration in substance means, that a cost-book company was formed pursuant to certain rules and regulations, that a purser was appointed who by virtue of one of those rules was empowered to sue for calls, that the defendant became a subscriber and thereby assented to the rules,—and, amongst others, that the amount of the calls should be a debt due from him to the purser. [WILLES, J.—Does the rule mean the purser at the time of the contract, at the time of the making of the call, at the time of bringing the action, or purser for the time being?] At the time the action is brought. It is said that there is no privity between the plaintiff and defendant, and no consideration moving from the plaintiff. The declaration, however, discloses this consideration,—the defendant becomes a subscriber and thereby agrees to be bound by the rules and regulations in the cost-book; and the plaintiff becomes purser upon the faith of those rules and of the defendant's having by subscribing them agreed that calls shall be recovered from him as a debt due from him to the purser. The question is not as to the adequacy of the consideration, but whether there is not *some* consideration. By this arrangement, the debt due to the co-adventurers is extinguished. In Chitty on Contracts, 6th edit., pp. 60—62, where the authorities are collected, there seems to be some conflict between the ancient and the more recent

decisions upon the question whether a stranger to a contract may sue upon it: and the *opinion of Lord Alvanley in Pigott *v.* Thompson, 3 Bos. & P. 147, is referred to,(*a*) and also a dictum of [*213 Buller, J., in Marchington *v.* Vernon, 1 Bos. & P. 101, n., to the effect that, "if one person make a promise to another for the benefit of a third, that third may maintain an action upon it." So, in Starkie *v.* Milne, 1 Rol. Abr. *Action sur Case*, 32, pl. 13, it is said, "It has been decided, that, if A. give goods to B. of the value of 80*l.*, on condition that he pay 20*l.* to C., the latter may sue B. for the 20*l.*, for it became a debt to C." It may be said that this is not a promise to the co-adventurers for the benefit of the purser. It would, however, be a good answer to an action at the suit of the co-adventurers.

WILLIAMS, J.—I am of opinion that there must be judgment for the defendant upon this demurrer. In order to get over the difficulty of want of consideration, Mr. *Collier* puts the case of a man accepting the office of purser, in consideration of the shareholders undertaking to pay their calls to him. It is not necessary, however, to decide that. All that appears here is, that, there being a difficulty in enforcing the payment of calls by the shareholders in cost-book mines, the adventurers, in order to get rid of that difficulty, agree amongst themselves that the amount of calls due from any one of them shall be considered as a debt due to the purser, who shall have power to sue for it,—thus violating the law in two respects, first, by agreeing that *one partner may sue his [*214 copartner,(*b*) secondly, by agreeing that an action shall be brought upon a contract by one who is no party to it, and between whom and the person sued there is no privity. They might as well agree that no plea shall be pleaded except payment. This is neither more nor less than the case of an action brought for a debt due to the company by a person who is a mere servant of the company, and who has no connection whatever with the cause of action in respect of which he is suing. It may be, as Mr. *Collier* suggests, that the law operates hardly in the case of these companies: but, if it be a hardship, the remedy must be sought at the hands of the legislature; and I know no one so fit to advocate such a measure as the learned counsel who has made the suggestion.(*c*)

CROWDER, J.—I am of the same opinion.

WILLES, J.—I agree with the rest of the court in thinking that this declaration cannot be supported, and for this additional reason, that, if we were to hold that the purser might maintain this action, it would be

(*a*) "It is not necessary to discuss whether if A. let land to B., in consideration of which the latter promises to pay the rent to C., his executors and administrators, C. may maintain an action on that promise. I have little doubt, however, that the action might be maintained, and that the consideration would be sufficient; though my Brothers seem to think differently upon this point. It appears to me that C. would be only a trustee for A., who might for some reason be desirous that the money should be paid into the hands of C. In case of marriage, it is often necessary to make contracts in this manner, and the personal action is given to the trustee for the benefit of the feme covert."

(*b*) It did not appear on the trial of Hybart *v.* Evens, post, 215, whether or not the purser was a subscriber.

(*c*) *M. Smith* observed that these cost-book mining companies were not entitled to much sympathy, inasmuch as they had struggled successfully to get themselves excluded from the Joint Stock Companies Act, 7 & 8 Vict. c. 110, the 63d section of which provides "that nothing in this act contained shall extend or be construed to extend to any partnership formed for the working of mines, minerals, and quarries of what nature soever, on the principle commonly called the cost-book principle."

trenching upon the prerogative of the Crown, by making a new species of corporation,—a corporation sole for the purpose of bringing actions.

Judgment for the defendant.

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*215] *Another action which had been brought by the same plaintiff against one Evens, and in which the declaration was the same as that in Hybart *v.* Parker, was tried before Coleridge, J., at the Bristol Summer Assizes, 1857, when the plaintiff was nonsuited, with liberty to move to enter a verdict for the plaintiff for the sum claimed, on the ground, that, assuming the facts stated in the declaration to be proved, they disclosed evidence of a debt. A rule nisi was accordingly obtained by *Collier*, Q. C., in Michaelmas Term last, and that rule was ordered to stand over until the demurrer was argued.

David Keane now showed cause, referring to the case of The Feltmakers' Company *v.* Davis, 1 Bos. & P. 98. Rule discharged.

END OF HILARY VACATION.

CASES

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS,

IN

Easter Term,

XXI. VICTORIA. 1858.

The Judges who usually sat in Banc in this Term, were:

COCKBURN, C. J.	WILLES, J.
CROWDER, J.	BYLES, J.

WILLIS, MERRY, and SMITH *v.* DE CASTRO. *April* 28.

To an action for goods sold and delivered, the defendant pleaded that the causes of action accrued to the plaintiffs against the defendant and A., B., and C., *jointly, and not otherwise*, and not separately against the defendant, and that the defendant and A., B., and C. were *jointly liable* to the plaintiffs in respect of the causes of action in the declaration, *and not otherwise*; and that, after the accruing of the causes of action, and before suit, the plaintiffs by deed released A., B., and C. from the said causes of action, &c.

Replication, that the deed in the plea mentioned was a deed of assignment by A., B., and C., of their estate and effects for the benefit of their creditors, and contained words purporting, if considered without reference to any other part of the deed, to release as in the plea pleaded, but that, in another and earlier part of the same deed, it was agreed and declared in the words following, that is to say, "that it shall be lawful for the creditors to execute these presents without prejudice to any mortgage, lien, or security which they may have for their respective debts, or any part thereof, or to any claim against any surety or sureties or any other person or persons who may be liable for the payment thereof;" and that all the creditors who executed the deed, executed the same without prejudice as aforesaid; and so the plaintiffs said that the defendant was not released as in and by the plea supposed:—

Held, on demurrer, that, taking the plea and replication together, the deed appeared to amount only to a covenant not to sue A., B., and C., and not to a release; and, consequently, that the liability of the defendant,—whether joint only, or joint and several,—was not thereby discharged.

THIS was an action for goods bargained and sold and sold and delivered, for work and materials, money lent, money paid, interest, and money found due upon accounts stated.

*2] *The defendant pleaded,—first, never indebted,—secondly, payment,—thirdly, that the causes of action accrued to the

plaintiffs against the defendant and G. S. Miller, E. Thompson, and W. C. Miller, jointly, and not otherwise, and not separately against the defendant, and that the defendant and G. S. Miller, E. Thompson, and W. C. Miller, were jointly liable to the plaintiffs in respect of the several causes of action in the declaration mentioned, and not otherwise, and the defendant was not solely liable in respect thereof; and that, after the accruing of the said causes of action, and before this suit, the plaintiffs by deed released the said G. S. Miller, E. Thompson, and W. C. Miller from the said causes of action, and all suits, claims, and demands which the plaintiffs then had, ever had, or at any time thereafter should or might have, claim, challenge, or demand against the said G. S. Miller, E. Thompson, and W. C. Miller,—fourthly, that the said causes of action accrued to the plaintiffs against the defendant and E. Thompson jointly, and not otherwise, and not separately against the defendant, and that the defendant and the said E. Thompson were jointly liable to the plaintiffs in respect of the several causes of action in the declaration mentioned, and not otherwise, and the defendant was not solely liable in respect thereof; and that, after the accruing of the said causes of action, and before this suit, the plaintiffs by deed released the said E. Thompson from the said causes of action, and all suits, claims, and demands which the plaintiffs then had, ever had, or at any time thereafter should or might have, claim, challenge, or *demand against the said E. Thompson,—fifthly, that the said causes of action accrued to the plaintiffs against the defendant and G. S. Miller, E. Thompson, and W. C. Miller jointly, and not otherwise, and not separately against the defendant, and that the defendant and the said G. S. Miller, E. Thompson, and W. C. Miller, were jointly liable to the plaintiffs in respect of the several causes of action in the declaration mentioned, and not otherwise, and the defendant was not solely liable in respect thereof; and that, after the accruing of the said causes of action, and before this suit, the plaintiff Merry by deed released the said G. S. Miller, E. Thompson, and W. C. Miller, from the said causes of action, and all suits, claims, and demands, which the plaintiffs then had, ever had, or at any time thereafter should or might have, claim, challenge, or demand against the said G. S. Miller, E. Thompson, and W. C. Miller,—sixthly, that the said causes of action accrued to the plaintiffs against the defendant and E. Thompson jointly, and not otherwise, and not separately against the defendant, and that the defendant and the said E. Thompson were jointly liable to the plaintiffs in respect of the several causes of action in the declaration mentioned, and not otherwise, and the defendant was not solely liable in respect thereof; and that, after the accruing of the said causes of action, and before this suit, the plaintiff Merry by deed released the said E. Thompson from the said causes of action, and all suits, claims, and demands which the plaintiffs then had, ever had, or at any time thereafter should or might have, claim, challenge, or demand against the said E. Thompson.

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The plaintiffs joined issue upon the first plea, took issue upon the second, and to the third, fourth, fifth, and sixth, replied that the deed in each of those pleas respectively mentioned was one and the same deed, to wit, a deed of assignment from the said G. S. Miller,

*E. Thompson, and W. C. Miller, of their estate and effects for the benefit of their creditors, and contained words purporting, if considered without reference to any other part of the deed, to release as in the same pleas respectively was pleaded,—but that, in another and earlier part of the same deed, it was and is agreed and declared in the words following, that is to say, "that it shall be lawful for the creditors to execute these presents without prejudice to any mortgage, lien, or security which they may have for their respective debts, or any part thereof, or to any claim against any surety or sureties or any other person or persons who may be liable for the payment thereof;" and that all the creditors who executed the said deed executed the same without prejudice as aforesaid; and so the plaintiffs said that the defendant was not released as in and by the said pleas respectively was supposed. [*219

To this replication the defendant demurred, the ground stated in the margin being "that the deed released the debt notwithstanding the clause in question, and that, when one of two joint debtors is released, there being no separate liability, the whole debt is gone." Joinder.

Milward (with whom was *M. Chambers*, Q. C.), in support of the demurrer.—The question is whether one of several joint debtors can be released, the liability of the other being reserved. In 2 Wms. Saund. 47 *gg*, n. (1), it is said, that "a release to one of several obligors, whether they are bound *jointly*, or *jointly and severally*, discharges the others, and may be pleaded in bar by all: 2 Rol. Abr. 412 (G.), pl. 4, 5; Clayton *v.* Kynaston, 2 Salk. 574." Primâ facie, the release of one discharges all: the debt is gone. In Cocks *v.* Nash, 9 Bingh. 341 (E. C. L. R. vol. 23), 2 M. & Scott 434 (E. C. L. R. vol. 28), to a plea that the plaintiff had released one of two joint obligors, the *plaintiff replied that the release was given with an undertaking on the part of the defendant, the other obligor, that the release should not operate in his discharge: and the replication was held ill. [WILLIAMS, J.—The general words of a release may be restrained by other parts of the instrument: Solly *v.* Forbes, 2 B. & B. 38 (E. C. L. R. vol. 6), 4 J. B. Moore 448 (E. C. L. R. vol. 16).] Where the parties are jointly and severally bound, the several liability may be preserved though the joint liability is released: North *v.* Wakefield, 13 Q. B. 536 (E. C. L. R. vol. 66); Stevens *v.* Stevens, 5 Exch. 306.† The ground of the distinction is very clearly put by Channell, Serjt., in Thompson *v.* Lack, 3 C. B. 540, 549 (E. C. L. R. vol. 54). It was there held that a release to one of two sureties who had entered into a joint and several covenant to pay an annuity, in default of payment by the grantor, was accompanied by a proviso that such release should not prejudice the right of the grantee to enforce its payment against the grantor and the other surety, or either of them: and it was held that the proviso restrained the operation of the release, and that the liability of the co-surety was not affected by such release. [WILLES, J.—What would be the effect of a covenant not to sue one of two joint debtors, which would be a release of the one only?] To avoid circuity, it might be pleaded as a release of both. [*220

John Henderson, contrà.(*a*)—It is clear that a covenant not to sue one

(*a*) The point marked for argument on the part of the plaintiffs was,—"that the deed pleaded, as qualified by the words set out in the replication, does not in law operate to discharge the defendant."

of two joint debtors is not a release of the other: Hutton v. Eyre, 6 Taunt. 289 (E. C. L. R. vol. 1), 1 Marsh. 603 (E. C. L. R. vol. 4). [BYLES, J.—Might not the one to whom the covenant not to sue is given plead it as a release?] No. A release in terms given to one, and *221] guarded and restrained so as not *to release the other, is a mere covenant not to sue: Solly v. Forbes, 2 B. & B. 38 (E. C. L. R. vol. 6), 4 J. B. Moore 448 (E. C. L. R. vol. 16). [CROWDER, J.—In order to give effect and operation to the deed as intended between the parties.] The observations of the court in North v. Wakefield, 13 Q. B. 536 (E. C. L. R. vol. 66), show that the principle of the thing applies just as much to the case of a joint and several liability as to that of a joint liability. Patteson, J., in giving judgment, says: "The reason why a release to one debtor releases all jointly liable, is because, unless it was held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released: but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor. Neither does such a clause qualifying the release operate as a fraud on other creditors; for, as it appears on the face of the deed, all who execute that deed are aware of it and agree to it." The argument urged on the other side would tend very materially to impair many securities. [*Watkin Williams*, Amicus Curiæ, mentioned a case of Currey v. Armitage, which had been decided in the Court of Queen's Bench on the preceding day, where this point had been decided. It was an appeal from the decision of the judge of the county court of Durham. The action was brought to recover 47*l.* 10*s.* for goods supplied to the ship Céleste, of Hartlepool, of which the defendant Armitage and one Drysdale were the owners. The defendant lived at some distance from Hartlepool, and left the entire management of the ship to his co-owner, who appointed the master. The goods for which this action was brought had been ordered by the master, with the authority of Drysdale. Drysdale became insolvent, and was indebted to the plaintiff, *222] in addition *to the above sum of 47*l.* 10*s.*, in the sum of 54*l.* 10*s.* for goods supplied to ships in which the defendant had no interest, making in the whole 102*l.* Drysdale compounded with his creditors, paying 10*s.* in the pound: a composition deed was entered into, containing in terms the usual release, followed by a proviso that nothing therein should prejudice or affect any claim, demand, or remedy which the creditors had upon any person who might be liable for any of the debts in the character of surety or otherwise. The plaintiff signed this deed, but did not insert the amount of the claim, stating at the time that he did not intend to include the 47*l.* 10*s.*: afterwards, however, without the plaintiff's authority, the whole sum of 102*l.* was filled in. Three questions arose,—first, whether the defendant as part owner, and taking no part in the management of the ship, could be made liable on the contract of the master appointed by Drysdale,—secondly, whether the deed was the plaintiff's deed quoad the 47*l.* 10*s.*—thirdly, whether, if the deed was the plaintiff's deed, it amounted to a release or merely to a covenant not to sue. The judge decided that the defendant was liable on the contract, and that the deed was the plaintiff's deed, but that it amounted only to a covenant not to sue, and therefore did not operate as a bar to the action. Lord Campbell, in giving judgment, said: "The

first point turns entirely upon whether there was a contract on the part of the defendant; and we think there was sufficient to justify the judge in determining that Drysdale had authority to bind the defendant jointly with himself, so as to bring him within the rule laid down by us in Mitcheson *v.* Oliver, 5 Ellis & B. 419 (E. C. L. R. vol. 85). Upon the second point, we think it is clear that, if the amount was filled in without the authority of the plaintiff, the deed, although signed by him, was not his deed, so as to release the debt of 47*l.* 10*s.* Upon *the third point, looking to the whole deed, and giving effect to the obvious intention of the parties, apparent on the deed itself, it must be treated as a covenant not to sue, and not as a release. This case is not distinguishable in principle from Solly *v.* Forbes, 2 B. & B. 38 (E. C. L. R. vol. 6), 4 J. B. Moore 448 (E. C. L. R. vol. 16). It is clear that an absolute release in terms, followed by a clause saving remedies against certain parties, cannot be treated as a release, if the effect of so doing is to prevent the operation of the saving clause: the whole must be taken together, and effect given to the intention of the parties."] [*223

Milward, in reply.—In the case just referred to, there was no joint liability in the first instance: part owners of ships are not ordinary partners. This is not to be treated upon this record as a mere covenant not to sue: it is pleaded as a *release;* and the replication admits it to be so. [WILLES, J.—The replication sets out a part of the deed which controls the effect of it as stated in the plea. It may be that the replication is only an argumentative denial of the plea: but argumentativeness is not now an objection.]

CROWDER, J.—I am of opinion that the plaintiffs are entitled to judgment. The plea in terms shows a joint liability in the defendant and three other persons, and a release by the plaintiff of those three. Had that stood alone, the plea would have shown that which in law would operate as a release of all. But the replication shows that that is not the true effect of the deed; for that, in another part of it, was contained a provision that it should be lawful for the creditors to execute the same without prejudice to any mortgage, lien, or security which they might have for their respective debts, or any part thereof, or to any claim against any surety or sureties, or any other person or persons who *might be liable for the payment thereof, and that all the creditors who executed the deed executed the same without prejudice as aforesaid. It is insisted on the part of the plaintiffs that the true nature and operation of the deed as disclosed by the replication, is, that it amounts only to a covenant not to sue the parties released. In order to be an answer to the declaration, the plea must allege a release. Then, to meet that, the replication introduces the words which qualify and control the operation of the deed. To hold that the deed thus disclosed upon the whole record enured as a release, would be manifestly giving it an effect contrary to the intention of the parties. It is common knowledge that every deed must, if possible, be so construed as to give effect to all its parts, and to effectuate the intention of the covenanting parties. So construing this deed, the covenant in question amounts only in my opinion to a covenant not to sue the persons mentioned in the plea, and not to a release, and consequently the right to sue the defendant remains. If so, Hutton *v.* Eyre, 6 Taunt. 289, 1 Marsh. 603 (E. C. L. R. vol. 4), where it was held that a covenant not to sue one of two *joint* [*224

debtors does not operate as a release of the other, is quite conclusive. Most of the cases referred to in the judgment certainly were cases of *joint and several* liability. Gibbs, C. J., says: "The principle on which the covenant not to sue is held to operate as a release, is, to avoid circuity of action; but it goes no further. Eyre says it goes much further; it is a release as between me and those to whom I and Hutton were jointly indebted, and, being a release to me, it is a release to Hutton, who was jointly with me obliged for payment of that debt: and he relies on certain authorities, which, however, show that the rule is not universal that a covenant not to sue is a release of those jointly with whom
*225] the covenantee may be *sued. Dean *v.* Newhall, 8 T. R. 168, is cited. There, an issue was joined on the release of another party with whom the defendant was jointly and severally bound: and it was contended that a covenant not to sue, and the covenant that those presents should be a sufficient release of the other obligor, would operate as a release to the defendant who was bound with him: but the court were of opinion that the rule how far a covenant not to sue should operate as a release, was limited to the parties themselves. Certainly that case in all its parts is not like the present: there, the party was jointly and severally answerable to the plaintiff, who might sue the one obligor without the other: and in the case of Lacy *v.* Kinaston, 12 Mod. 548, 552, 1 Ld. Raym. 688, on which that case of Dean *v.* Newhall is much founded, it was stated as the reason of the judgment, that, the bond being joint and several, the obligee might sue one without the other. The fact is not so here, therefore the same doctrine is not applicable, and we must consider it on principle, whether the law applies to the present case. In the case of a creditor suing a single debtor whom he has covenanted not to sue, it not only promotes the doctrine which prevails so strongly in the law, of preventing circuity of action, but it falls in with the intent of the parties, to hold that the covenant shall operate as a release; but it is impossible that it should here be in the contemplation of the parties, that, in covenanting not to sue Eyre, the insufficient debtor, he meant to release Hutton, who was sufficient. It was as easy to insert in the deed a release, as a covenant not to sue, and it would have been shorter: it must be inferred that the parties did not insert a release, because it would release Hutton also; but it is this day contended that a covenant not to sue has the same effect. Where the words, by being extended beyond their obvious intent, would,
*226] *as it seems, go beyond the intent of the party, the court ought not to put that construction on them." There is, therefore, no foundation for the distinction suggested by Mr. *Milward;* and no case can be found where it has prevailed. The result of all the authorities, as it seems to me, is, that, if, looking at the whole deed, we can see that it amounts only to a covenant not to sue, and not to a release, the right of action against those who are no parties to the covenant is preserved. That being, in my opinion, the effect of this deed, I think the plaintiffs are entitled to judgment on this demurrer.

WILLES, J.—I am of the same opinion. It is the duty of the court, in construing a deed or other written instrument, to give, if possible, effect to every word. The part of this deed which is set out in the replication plainly indicates the intention of the parties to be that it shall not enure as a discharge of the solvent partner. That intention

could not be carried into effect if the covenant were held to amount to a release. The only way in which full effect can be given to the deed, so as to carry out the intention of the parties, and to avoid doing violence to any part of the language they have used, is, to construe it as a covenant not to sue or molest those who were intended to be discharged by it. By so construing the deed, the three are effectually discharged, and the liability of the fourth (the defendant) preserved. Mr. *Milward* has raised a question upon the pleadings, which seems to deserve a word. The plea sets up the deed as a release. It appears to me that the point relied upon by Mr. *Henderson* might be taken on a simple traverse, when the plea would be answered by the production of the deed at the trial: and that, perhaps, would have been the safer course. The plaintiffs, however, have *chosen to reply specially matter [*227 which amounts to an argumentative denial of the release alleged in the plea. To make the replication a good answer, it must be good in omnibus. As at present advised, it appears to me that the replication is sufficient. But, if the defendant should be minded to take the opinion of a court of error upon the point, it may be worth the plaintiffs' while to consider whether they will not now adopt the course suggested.

Byles, J.—I also am of opinion that the replication is a good answer to the pleas. We have in this case to endeavour to arrive at the intention of the parties from the four corners of the instrument, so far as it is disclosed upon the face of the record. Now, the deed appears to contain an express covenant that all obligations on land, and all claims against sureties or other persons liable for the respective debts, should stand unprejudiced thereby; and yet it has been contended on the part of the defendant that the obligation of a joint principal debtor is discharged by the technical words of the release of his co-debtors. That clearly was not the meaning of the parties: and I think we are bound to make subordinate though stubborn words bow and incline themselves before the supreme and paramount intention manifested by the whole of the deed. We must, therefore, construe the instrument as a covenant not to sue, and nothing more.

Judgment for the plaintiffs.

A covenant not to sue, by its terms perpetual or for an indefinite period, may unquestionably be pleaded in bar to an action upon the original indebtedness: Hastings *v.* Dickenson, 7 Massachusetts 153; Phelps *v.* Johnson, 8 Johnson 50; Jackson *v.* Stackhouse, 1 Cowen 122; Girard *v.* Whitesides, 13 Illinois 9; Stebbins *v.* Niles, 25 Mississippi 269; Millet *v.* Hayford, 1 Wisconsin 401; Clark *v.* Russell, 3 Watts 219. But this, which is a departure from principle, is permitted only to avoid circuity of action. In other respects such a covenant has not the technical effect of a release. It will not, therefore, when made in favour of one of several joint obligors, operate, even at common law, to discharge the rest: Sewell *v.* Sparrow, 16 Massachusetts 24; Smith *v.* Bartholomew, 1 Metcalf 278; Goodnow *v.* Smith, 18 Pickering 444; Walker *v.* McCullough, 4 Greenleaf 44; M'Lellan *v.* Cumberland Bank, 24 Maine 566; Darell *v.* Wendell, 8 New Hampshire 369; Catskill Bank *v.* Messenger, 9 Cowen 37; Tomb *v.* Green, 5 Barbour 455; Mason *v.* Jonett, 2 Dana 107; Ward *v.* Johnson, 6 Munford

6; Bogeman v. State Bank, 2 English 328. If, indeed, the other obligors are sureties, and known by the creditor to be such, the covenant might destroy their responsibility, by the operation of a different principle: see Frazer v. Jordan, 8 Ellis & Blackburn 303, and note. Yet, even in this case, if the right of the creditor to proceed against the sureties, has been expressly reserved, they cannot set up the covenant as a discharge of their liability: Hubbell v. Carpenter, 1 Selden 171; Yates v. Donaldson, 5 Maryland 389; Campbell v. Booth, 8 Id. 107; Sohier v. Loring, 6 Cushing 537. Hence, in Lysaght v. Phillips, 5 Duer 106, a case very similar to that reported in the text, it was held that a composition deed containing a covenant not to sue the principal debtor, but reserving all rights of the creditors executing as against third persons not parties to the deed, who might be liable as drawers, endorsers, acceptors, or otherwise, &c., was no bar to an action by one of the creditors against an accommodation drawer of a bill accepted by the insolvent, and included in the composition.

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*228] *TEAR v. FREEBODY. *April* 28.

By the 143d section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, after the 1st of January, 1856, no building is to be erected beyond "the regular line of buildings in the street in which the same is situate:"—Held, that this does not mean a strict mathematical line, but a substantially regular line.

A building is not an "old building" within this statute and the 8th section of the Metropolitan Buildings Act, 18 & 19 Vict. c. 122, unless the "enclosing walls" (which expression is not satisfied by two mere boundary walls, at either side of the ground) were carried higher than the footings before the 1st of January, 1856.

By the 28th section of the 18 & 19 Vict. c. 120, the duties of vestries are to be performed by the majority present. By a by-law made pursuant to the 202d section, it was provided that "all questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded:"—Held, that the division or poll might take place after a show of hands.

The plaintiff having erected a building in contravention of the 143d section of the 18 & 19 Vict. c. 120, a resolution of a vestry was passed directing their surveyor to demolish the portion which encroached beyond the line. The surveyor having taken down the offending building, placed the materials within a hoarding on the carriage-way, and afterwards removed them to the parish stone-yard, and detained them there *as a security and pledge for the costs and expenses of so taking down the building*, in the bonâ fide belief that he was entitled so to do under the resolution of the vestry; and the case (settled by an arbitrator) found that the plaintiff could not have obtained the said materials back, without paying the said costs and expenses:—Held, a conversion.

THIS cause came on for trial before Crowder, J., at the sittings at Westminster after Trinity Term, 1857, when an order was made as follows:—"It is ordered by the court, with the consent of all parties, their counsel and attorneys, that a verdict be entered for the plaintiff for the claim in the declaration, costs 40*s*., and that it be referred to D. K. Esq., barrister-at-law, to state a special case for the opinion of the court, and to find the damages (if any) to which the plaintiff is entitled; all questions of law, and mixed questions of law and fact, to be reserved for the consideration of the court; the court to have the power of drawing all inferences from the facts which a jury might have drawn: And, by the like consent, it is also ordered that the witnesses to be examined before the said arbitrator touching the matters referred shall be examined upon oath, &c.: And, by the like consent, it is also

ordered that the said arbitrator shall have all the powers as to certifying, amending, and otherwise, of the court and of a judge of nisi prius and of a judge at chambers: And, by the same consent, it is also ordered that the costs of the cause, to be taxed, and of the reference and case, to be taxed, shall abide *the event: It is also ordered, that, in the event of the said arbitrator declining to act, or [*229 dying before he shall have made his award, the said parties may, or, if they cannot agree, the Lord Chief Justice of the Court of Common Pleas may, on application by either side, appoint a new arbitrator: It is also ordered that the court may, if they think fit, from time to time remit the case back to the arbitrator for amendment, alteration, or re-statement, wholly or in part: And lastly, it is ordered that either of the said parties shall be at liberty to move Her Majesty's Court of Common Pleas that this order may be made a rule of the same court."

In pursuance of this order, the following case was stated for the opinion of the court:—

This was an action of trespass for pulling down part of a house of the plaintiff in Victoria Road, Dalston, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, one of the parishes in Schedule A. to the 18 & 19 Vict. c. 120, "An Act for the better local management of the metropolis," and also for the conversion of the building materials of the part of the house so pulled down.

The first count of the declaration stated that the defendant broke and entered certain land of the plaintiff situate at Victoria Road, Dalston, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, between a row of houses there called Priory Terrace and houses called the Marlborough Road, and pulled down and prostrated a great part of a house and building of the plaintiff erected on his said land, and the materials, to wit, bricks, timber, wood, slates, and other building materials of the plaintiff of which the same was built. The second count stated that the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of his goods, to wit, bricks, *slates, timber, wood, and other materials; *and by reason* [*230 *of the premises one Hutchings, who otherwise would have become tenant of the said house and building of the plaintiff for a term of seven years from the 24th day of June*, 1858, *at a rent of 35l. per year, refused to become tenant of the same, and the said house and building of the plaintiff had from thence hitherto remained untenanted.*(a) Claim, 500*l.*

The defendant pleaded,—first, not guilty,—secondly, as to the first count, that the said land, house, building, and materials, were not the land, &c., of the plaintiff, as alleged,—thirdly, as to the first count, that the said parish of St. Leonard, Shoreditch, in the declaration mentioned, was and is one of the parishes mentioned in the schedule A. to an act of parliament passed, &c. [18 & 19 Vict. c. 120]; that the said house and building was erected and built by the plaintiff on the said land after the passing and coming into operation of the said act of parliament; that the said part of the said house and building alleged to have been pulled down and prostrated, was erected and built on the said land contrary to the provisions of the said act of parliament, that is to say,

(a) The words in italics were added by the arbitrator by way of amendment, at the request of the plaintiff's counsel. His right to make such amendment was denied by the defendant's counsel.

the said part was, without the consent in writing of the Metropolitan Board of Works, erected beyond the regular line of buildings in the street in which the same was situate, to wit, the said Victoria Road in the declaration mentioned, the distance of such line of buildings from the high road not exceeding thirty feet; wherefore the defendant, as the servant and by the command of the vestry of the said parish of St. Leonard, Shoreditch, did demolish the said part of the said
*231] *house and building, and, in so doing, did necessarily and unavoidably commit the alleged trespasses in the first count mentioned, doing no unnecessary damage to the plaintiff; and that, before and at the time of the committing by the defendant of the said alleged trespasses, all things had happened and did exist to render it lawful for the said vestry and the defendant to demolish the said part of the said house and building of the plaintiff under and by virtue of the said statute, —fourthly, as to the said first count, the defendant repeats all the allegations of his third plea, except that, instead of alleging that he committed the alleged trespasses in demolishing the said part of the said house and building as in the said third plea alleged, he in this plea alleges that he committed the alleged trespasses in order to set back and in setting back the said house and building of the plaintiff according to the true intent and meaning and under the provisions of the said statute, —fifthly, as to the second count, that the goods were not the plaintiff's as alleged,—sixthly, as to the second count, the defendant repeats the allegations of his third plea, and he further says, that, because he could not demolish the said part of the said house and building within the true intent and meaning of the said act of parliament in the third plea mentioned without removing the materials thereof to a short and convenient distance in that behalf, and there leaving the same for the plaintiff, he the defendant did remove the said materials to a short and convenient distance in that behalf for the plaintiff, as he the defendant lawfully might for the causes aforesaid; that the goods in the second count mentioned were and are the said materials so removed by him as aforesaid; and that the said removing thereof as aforesaid was and is the alleged grievances in the second count mentioned,—seventhly, as to
*232] the second count, the defendant repeats *the allegations of his fourth and sixth pleas respectively, except that, instead of alleging that he could not demolish the said part of the said house and building within the true intent and meaning of the said act of parliament without removing the materials thereof as in the sixth plea alleged, the defendant in this plea alleges that he could not set back the said house and building within the true intent and meaning of the said act of parliament without removing the said materials as in the sixth plea alleged.

The plaintiff joined issue on the defendant's pleas; and, as to the third, fourth, sixth, and seventh pleas, the plaintiff new assigned that he sued not only for the grievances in those pleas admitted, but also for trespasses and grievances committed by the defendant in excess of the alleged rights, and on other occasions, and for other purposes than those referred to in the said pleas.

To the new assignment, the defendant pleaded not guilty.

Before and on the 1st day of January, 1856, the plaintiff was and still is the occupier of a piece of ground on the north-eastern side of Victoria Road, Dalston, in the parish of St. Leonard Shoreditch, having

a frontage to the said road of 18 feet 6 inches, extending back from that road a distance of 90 feet to 100 feet northwards, and bounded on the west by a wall commencing at the north-eastern footpath of Victoria Road, and extending back northwards to nearly the whole depth of the piece of land, and on the east by a similar wall parallel to the former, but commencing with a pier at a distance of three feet from the said footpath.

Both the said walls had been carried higher than the footings thereof before the said 1st of January, and had so been at all times since.

On the 1st of January, 1856, the said western wall *was about six feet high, and for a distance of about fifty feet northwards [*233 from the said footpath separated and still separates the plaintiff's said land from the garden of a house then and still belonging to one Adcock, which house was and is situate at the north-eastern corner of Victoria Road aforesaid, and another road there called Marlborough Road, fronts Marlborough Road, and has no opening whatever on Victoria Road, from which it was and is separated by a blank wall about six feet high and about 83 feet in length. The said eastern wall, at a distance of three feet from the said pathway, touched the north-western fence of the forecourt of the first of a row of nine houses on the same side of Victoria Road, running eastwards from the said piece of land, and called Priory Terrace. Each of the said nine houses has a forecourt in front of it, separated from the said north-eastern footpath by a railing.

The houses No. 1, 2, 8, and 9, are built at a distance of 11 feet 6 inches from the said footpath; the houses No. 3, 4, 5, 6, and 7, are built at a distance of 12 feet 3 inches from the said footpath.

The forecourts of these nine houses are separated from one another by railings, and are of the same width. At the eastern end of Priory Terrace, there is a piece of land, in the centre of which is a block of two cottages of equal size, called Boundary Cottages, having before them, towards Victoria Road, forecourts of equal size, which forecourts are separated from the north-eastern footpath of Victoria Road by a railing of the same description as and continuing in a straight line with the said railing in front of Priory Terrace. The western side of the block is distant from the eastern wall of No. 9, Priory Terrace, about four feet; and the eastern side of the block is exactly the same number of feet distant from the western wall of the *first of a row of [*234 houses extending eastward, called Portland Terrace. The last-named terrace consists of twelve houses. Nos. 1, 2, 6, 7, 11, and 12, being distant from the said footpath 11 feet 6 inches, and Nos. 3, 4, 5, 8, 9, and 10, being 12 feet 3 inches distant from the same. The forecourts of Nos. 1 and 12 are somewhat wider than those of the other houses; yet, in all other respects, Portland Terrace resembles Priory Terrace, and it is separated from the said footpath by a railing which is a continuation of the railing in front of Priory Terrace and Boundary Cottages.

A straight line may be drawn horizontally eastwards from the edge of the south-western corner of No. 1, Priory Terrace, which is at a perpendicular distance of 11 feet 6 inches from the north-eastern footpath of Victoria Road, through the edge of the south-eastern corner of the last house in Portland Terrace, which is also at a perpendicular distance of 11 feet 6 inches from the said north-eastern footpath: and

the several houses in Priory Terrace, Boundary Cottages, and Portland Terrace, are built in symmetrical blocks close up to, or at a distance of nine inches from the said supposed straight line, from No. 1, Priory Terrace, to No. 12, Portland Terrace. Next to Portland Terrace, eastward, there is a large open and uncultivated piece of ground, which, measured by the north-eastern footpath of Victoria Road, its boundary to the south-east, is, and on the 1st of January, 1856, was, about 450 feet in length.

This portion of the footpath of Victoria Road describes an irregular curve; the eastern extremity of it being at a perpendicular distance of about 100 feet from the supposed horizontal line drawn eastward through the south-west corner of No. 1, Priory Terrace, and the south-eastern corner of the last house eastward in Portland Terrace. Eastward, and next to the *said irregular piece of ground, is a row of three houses built in the same manner in every respect as the houses in Priory and Portland Terraces, one of them having a forecourt in front 12 feet 3 inches deep, and two having forecourts 11 feet 6 inches deep. These three houses are separated from the said north-eastern footpath by a railing similar to that one in front of Priory Terrace and Portland Terrace. Next to the most eastern of these three houses, is a house used as a shop, built flush up to the said north-eastern footpath, at a spot where the Victoria Road takes such a direction from south-east to north-east that the commencement of a new street is suggested; and the last-mentioned house becomes a corner, though not an extreme corner, of Victoria Road.

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Thus, on the 1st of January, 1856, the north-eastern footpath of Victoria Road, between Marlborough Road and the said corner, was bounded on the north-east by a dead wall about 80 feet long; then by a hoarding, flush with the said dead wall, in front of the said piece of land of the plaintiff; then by a continuous line of rails in front of Priory Terrace, Boundary Cottages, and Portland Terrace; then by the said irregular piece of ground; then by the line of rails in front of the three houses next to the house at the said corner; then by the shop-front and wall of the house at the said corner.

At the same date, the buildings on the north side of Victoria Road were Adcock's house at the corner, having neither door nor window opening into Victoria Road, the two walls one on the east and the other on the west of the plaintiff's piece of land, then Priory Terrace, Boundary Cottages, and Portland Terrace, forming one regular line of buildings, unless the regularity was prevented by the fact that some of them recede some inches from the others, in the manner above *described: then followed the said irregular piece of ground, and then the said row of three houses, the houses of which are of the same description as, and, measured by perpendicular distance from the said north-eastern footpath, are in a regular line of building with, those in Priory Terrace and Portland Terrace.

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If it was a question of fact for him, the arbitrator found that Priory Terrace was a regular line of buildings; that Boundary Cottages were in a regular line of buildings; that Portland Terrace was a regular line of buildings; and that Priory Terrace, Boundary Cottages, and Portland Terrace, formed one regular line of buildings.

The width of the footpath in Victoria Road is about six feet; the width of the carriageway is about twenty-eight feet.

The south-western side of Victoria Road, between Marlborough Road and Pownall Road, which runs into Victoria Road opposite the said row of three houses, is, and on the 1st of January, 1856, was, divided into three compartments by Brownlow Road and Broke Road, which also run into Victoria Road, on the south-eastern side thereof. The first compartment consists of a wall with one window in it flanking the house at the south-west corner of Marlborough Road and Victoria Road, and then of a row of houses flush up to the south-eastern footpath, of an entirely different description from those in Priory Terrace, ending with a house at the corner of Brownlow Road differing in form from the others on that side, and from those in Priory Terrace. From Marlborough Road to Brownlow Road, none of the houses in Victoria Road project beyond any of the rest. Between Brownlow Road and Broke Road, on the south-eastern side of Victoria Road, there is a row of four houses similar to those in Priory Terrace, but only 8 feet 6 *inches distant from the footpath; then follows a piece of vacant ground having 200 feet of frontage towards the road; then two [*237 houses like the last, but built at a distance of ten feet from the footpath; and then a corner house, used as a shop, built about four feet from the line of footpath, and projecting about six feet beyond the line of buildings immediately to the east of it. Between Broke Road and Pownall Road there is first a vacant piece of ground about sixty feet in length, then a row of eight houses like those in Priory Terrace, 11 feet 6 inches from the road, and then a piece of vacant ground about forty feet long.

Sir William Middleton is the owner in fee of all the land hereinbefore mentioned, which so far as the same is covered is let by him on building leases for terms of ninety-nine years.

The said piece of ground of the plaintiff has been occupied by him for the last seven years, and he now holds it under an agreement with one Clarkson, the intermediate lessee of Sir William Middleton, which agreement is as follows:—

"Memorandum of agreement made this 23d of January, 1856, between George Clarkson, of, &c., of the one part, and J. M. Tear, of, &c., of the other part: the said G. Clarkson doth for himself, his executors, &c., once for all, hereby covenant, promise, and agree with and to the said J. M. Tear, his executors, &c., and the said J. M. Tear doth for himself, his executors, &c., once for all, hereby covenant, promise, and agree with and to the said G. Clarkson, his executors, &c., in manner and form following, that is to say,—

"1st. That, in consideration of the expense the said J. M. Tear will incur in making the erections hereinafter mentioned, and the rents and covenants hereinafter agreed to be paid and performed, the said G. Clarkson shall demise unto the said J. M. Tear, at *the time and [*238 in the manner hereinafter mentioned, all the pieces or parcels of ground situate, lying, and being on the north side of Victoria Road, leading from the Marlborough Road to Pritchard's Place and Duncan Place, in the parish of St. Leonard's, Shoreditch, and county of Middlesex, containing the several quantities and abutting on the respective directions more particularly described in the plan drawn in the margin thereof, and coloured green,—to hold the same unto the said J. M. Tear,

his executors, &c., from the 25th of December, 1846, for the term of ninety-nine years, at the rent of a pepper-corn till the 25th of March, 1856, and at the yearly rent of 5*l.* for the remainder of the term, payable quarterly, clear of all rates, taxes, or deductions whatsoever, whether the lease shall have been granted or not; the first quarterly payment to be due and payable on the 24th of June, 1856.

"2d. That all the erections and buildings shall be in accordance with the building act, and be erected under the direction and to the satisfaction of G. Clarkson, and also of Sir W. Middleton, or their surveyor for the time being; and all plans, elevations, and sections shall be approved by such surveyor previous to the commencement of the work: and no addition to or alteration in the said intended erections shall at any time be made without the license of the said surveyor in writing first had and obtained.

"3d. That the said J. M. Tear shall erect on the said ground one good and substantial messuage or dwelling-house of the fourth rate of building, and of the value of not less than 250*l.*, and to be fronted with second malm bricks and pickings; the said messuage to be carcased in, on or before the 28th of February, and to be completely finished fit for habitation on or before the 30th of June, 1856.

*239] "4th. That the said J. M. Tear shall, so soon as the *same shall have been carcased in, insure and keep insured the intended erection and building in the Law Fire Insurance Society, or some other respectable office in London or Westminster, in two-thirds the value thereof, such value to be ascertained from time to time by the surveyor for the time being of the said G. Clarkson.

"5th. That the said J. M. Tear shall pay, when thereunto required by the said Sir W. Middleton, his heirs or assigns, a reasonable share and proportion with the other lessees of the said Sir W. Middleton, the freeholder, towards the expenses incurred or to be incurred in making drains or sewers for the use and service of the said premises, at the rate prescribed by the surveyor of the said Sir W. Middleton.

"6th. That the whole of the ballast and shingle obtained by excavation and sifting for sand on the said premises, except what may be required for making paths and walks in and about the said premises, shall be placed at the disposition of the said G. Clarkson, free of expense, for removal.

"7th. That the said G. Clarkson shall not be compelled or required to produce or prove the title of the said Sir W. Middleton to the said premises, or to deliver any abstract thereof.

"8th. That, in case the said messuage or premises shall be completed at the time and in manner hereinbefore mentioned, the said G. Clarkson will at once, or so soon after as the said ground and messuage shall have been demised to him, demise unto the said J. M. Tear, his executors, &c., the said ground and messuage for the term and at the rent aforesaid; such lease and the counterpart thereof to contain all such covenants and provisoes as are consistent with this agreement, and also all such other covenants and provisoes as are usually inserted in

*240] leases granted by the said *Sir W. Middleton of ground on the same estate; but that the premises hereby agreed to be demised shall not be liable or subject to the rents or covenants in respect of any other property than that hereby agreed to be demised: the same shall

be prepared by the solicitor for the time being of the said G. Clarkson, at the expense of the said J. M. Tear, who shall accept such lease and execute a counterpart thereof.

"9th. That the said J. M. Tear shall not assign, part with, or pledge this agreement, or his interest therein, without the consent of the said G. Clarkson first had and obtained.

"10th. That in case of any breach or non-performance of this agreement on the part of the said J. M. Tear, or if he shall become bankrupt or insolvent, or execute an assignment of or surrender his effects for the benefit of his creditors, or if the said intended messuage or building shall at any time be left in an unfinished state, or the works shall not be regularly proceeded in to the satisfaction of the said G. Clarkson, or his surveyor, or in case of any breach or non-performance of any one or more of the covenants, clauses, or agreements hereinbefore contained on the part and behalf of the said J. M. Tear to be observed, performed, or kept, then and from thenceforth, and at any time or times thereafter, or in any of the said cases or events, it shall and may be lawful for the said G. Clarkson, his heirs or assigns, into or upon the said piece of ground hereby agreed to be demised, or any part thereof in the name of the whole, immediately or at any time thereafter to re-enter, and the said J. M. Tear and all other tenants and occupiers of the said premises thereout and from thence by force, if necessary, and without action or suit, to expel and remove, and the same, together with all erections, buildings, materials, and other things whatsoever therein or [*241 *thereupon, to have again, retain, repossess, and enjoy, without giving or allowing any compensation or equivalent whatsoever to the said J. M. Tear, or any other parties as if these presents had not been made, anything herein contained, and any rule of law or equity to the contrary thereof in anywise notwithstanding, and to plead leave and license to any action, suit, or other proceeding for so doing, of which this agreement shall be sufficient evidence.

"11th. That the said J. M. Tear shall, as soon as the said intended messuage shall have been covered in, lay down a six-inch stone-ware glazed drain-pipe, for the purposes of draining the said premises, and shall connect the same with the common sewer.

"12th. That the said J. M. Tear shall put down a proper stone curb at the edge of the pathway in front of the house herein referred to, of the entire length of the said frontage, and properly pebble the channel for the purpose of carrying off the water the whole length of the said frontage."

[Then followed a specification of the manner in which the messuage referred to in the agreement was to be erected.]

In February, 1856, the plaintiff began to erect on the said piece of land, and ultimately, before the committing of the grievances complained of, did erect on it, the carcase of a house 26 feet deep and 22 feet high, with a frontage towards Victoria Road of 18 feet. In constructing this house, the then-existing eastern and western walls before described were first reduced in height, but not taken down to the footings, and afterwards carried up to the full height of 22 feet. The northern wall, both footings and superstructure, was then built for the first time. The southern wall has never had footings, as the house was intended to be a baker's shop,

*242] with a shop-frontage of the ordinary *kind. The arbitrator therefore found as a fact, that the enclosing walls of the building so erected by the plaintiff had not been carried above the footings on or previously to the first of January, 1856. The southern wall of the said building was erected at a distance of three feet only from the north-eastern footpath of Victoria Road; and the house ultimately, at the time of the grievances complained of, projected towards the said footpath 8 feet 6 inches beyond any of the buildings in Priory Terrace, Boundary Cottages, or Portland Terrace; and 9 feet 3 inches beyond some of them.

The said building was so erected, and up to and at the time of the committing the grievances complained of was so continued, without the consent of the Metropolitan Board of Works.

On the 17th of April, 1856, the vestry of the parish of St. Leonard's, Shoreditch, took into their consideration a complaint made to them that the plaintiff was erecting at the corner of Priory Terrace, Victoria Road, a building beyond the regular line of building, and contrary to the 18 & 19 Vict. c. 120, s. 143, which enacts that "no building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the regular line of buildings in the street in which the same is situate, in case the distance of such line of buildings from the highway do not exceed 30 feet, or within thirty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds 30 feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway: and, in case any building be erected contrary to this enactment, it shall be lawful for the vestry or district board in whose parish or district such building is situate, to cause the same to be demolished, or set back, as the case may require, and to recover the expenses incurred by them from the owner of the premises, in manner provided by this act."

*243] *The number of elective vestrymen for that purpose is one hundred and twenty: the rector and two churchwardens are also members of the vestry.

The 28th section enacts that "all powers or duties to be performed by the vestry of any parish under this act may be exercised and performed respectively by the major part of such vestry assembled at any meeting, there being not less than five vestrymen present at a meeting of a vestry which consists of not more than eighteen elected vestrymen, and not being less than seven vestrymen present at a meeting of a vestry which consists of twenty-four elected vestrymen and no more, and not being less than nine vestrymen present at a meeting of a vestry which consists of thirty-six elected vestrymen or upwards: and, at every such meeting, all questions shall be decided by the votes of the majority of the vestrymen present: and the vestry may act notwithstanding any vacancies therein."

Under the 202d section the vestry has made by-laws for regulating their proceedings, the 13th of which by-laws is in the following terms: —"All questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded."

The said complaint having been considered by the vestry on the said 17th of April, it was moved and seconded "that the surveyor be directed to require Mr. Tear, of Priory Terrace, Victoria Road (the plaintiff), to set back the premises illegally built beyond the regular line of buildings,

within seven days: and, in case the said Mr. Tear shall refuse or neglect to set back such building to the satisfaction of the surveyor, the surveyor be directed to cause the same to be demolished, and recover the expenses thereof from the offender." A show of hands then took place, and there appeared for the motion fourteen, against it fourteen. *Thereupon, a division was demanded, and that the names be taken down. This was done, and there appeared, for the motion, twenty-five, against the motion, eighteen, neutral (that is, did not vote), one. Thereupon the chairman declared the motion carried. [*244

It was proved before the arbitrator that, between the commencement and the termination of the proceedings at the said meeting of the vestry, forty-nine members thereof and no more had been in the place of meeting; but no evidence was laid before him to show that all the forty-nine were present at the same time. The arbitrator found as a fact that forty-four were present when the said division took place; but he was unable to say how many were present when the show of hands took place. It was not objected before the arbitrator that the motion was not intended to apply to the said building of the plaintiff in Victoria Road; and therefore, although the said building is not in Priory Terrace, and there were buildings in Priory Terrace which the plaintiff had erected, he found as a fact that the motion *was* intended to apply to the said building of the plaintiff.

The vestry treated the motion as carried, that is to say, as a resolution of their body: the terms were communicated to the defendant, who was and is their chief surveyor; and he, on the 19th of the same month, gave notice to the plaintiff in the terms of the alleged resolution.

The plaintiff did not desist; but, on the 24th of April, sent a letter to the vestry as follows:—

"1, Priory Terrace, Dalston,
"24th April, 1856.

"Gentlemen,—Permit me most respectfully to solicit your kind reconsideration of my case respecting the building lately erected by me on ground adjoining No. 1, Priory Terrace, Dalston. I can assure you, that, *at the time I commenced the building, I was not aware of the clause in the Metropolitan Management Act, giving to the vestry control over any building that might be erected beyond the usual line of buildings, and was not then aware that the building was contrary to law. Having received notice from your surveyor on Saturday last, giving me notice to pull down a portion of the said premises within seven days from that date, I have inquired as to the jurisdiction of the vestry as to any such buildings as might be erected beyond the regular line of building in the street, and am perfectly satisfied that they have power to cause any projection to be demolished if they should think fit. Should I be compelled to pull down any portion of my premises, the loss will be most serious to me, and one that may injure me much in a pecuniary point of view. I beg to submit that the property being situated as it is can be no detriment to the adjoining property, being the first house in the row; and that the plan was approved of by Sir W. Middleton's surveyor previous to the commencement of the works. Under these circumstances, I humbly trust that you will be kind enough to reconsider the matter, and give instructions to your surveyor not to [*245

take any further proceedings to demolish any portion of the building, under the powers vested in you by the act.

(Signed) "J. W. TEAR."

This letter was brought to the notice of the vestry at an ordinary meeting held on the 8th of May, 1856, without previous notice of motion. It was thereupon moved and seconded, that the former order of the vestry of the 17th of April, 1856, be carried into execution; to which an amendment was moved, that the plaintiff should have fourteen days' notice to set back the buildings erected by him in Priory Terrace, from that day. The amendment was carried by twenty-one votes against sixteen.

*246] *The 57th section enacts that "no resolution or other act of the Metropolitan Board of Works, or of the board of works for any district, or of any such vestry, shall be revoked or altered at any subsequent meeting, unless such subsequent meeting be specially convened for the purpose, nor unless such revocation or alteration be determined upon by a majority consisting of two-thirds of the members of the board or of the vestrymen present at such subsequent meeting, if the number of members or vestrymen present at such subsequent meeting be not greater by one-fifth than the number present when such resolution was made or such act was done; but, if the number of members or vestrymen present at such subsequent meeting be greater by one-fifth than the number present at such former meeting, then such revocation or alteration may be determined upon by a mere majority."

It was proved before the arbitrator that, between the commencement and the close of the proceedings of the vestry on the 8th of May, fifty-seven members of the vestry and no more had been in its place of meeting; but there was no evidence to show that the said fifty-seven members were present together at the place of meeting. And the arbitrator found as a fact that only thirty-seven were present when the said amendment was put to the vote; he again, and for similar reasons as in the like case above given, found as a fact that the last-mentioned resolution and amendment applied to the said building of the plaintiff in Victoria Road.

On the 10th of May the defendant, as chief surveyor of the vestry, gave to the plaintiff a formal notice pursuant to the last-mentioned amendment, and at the same time sent him a letter to the like effect, concluding with these words,—"I trust you will commence forthwith, and obviate my giving instructions to cause the work to be done." The

*247] plaintiff, however, went on *with the work, and on the 5th of June, 1856, the defendant made a report to the vestry in the following terms:—

"Gentlemen,—I beg to report to this vestry, that, in obedience to their order, I caused another notice to be served on Mr. J. M. Tear on Saturday, the 10th of May, requiring him within fourteen days to set back the buildings he had constructed at Priory Terrace, Victoria Road, in this parish, beyond the regular line of buildings, and without the consent of this vestry. Mr. Tear has not proceeded to set back the premises in question within the period afforded him by this vestry, nor has he in any way notified to me as your officer why your order has been disregarded. Under these circumstances, I would now beg to direct the attention of this vestry to their first order herein made in

vestry 17th April, 1856, which authorizes your chief surveyor to cause the buildings in question to be demolished, or to receive your further pleasure thereon. (Signed) "W. Y. FREEBODY."

On the 19th of June, 1856, a special meeting of the vestry was duly held, pursuant to a requisition duly signed pursuant to the by-laws by nine members. The requisition stated several matters to be submitted to the consideration of the meeting. The first on the list was in these terms:—"To consider the report of the surveyor made to the vestry on the 5th instant, relative to an erection beyond the regular line of buildings in Priory Terrace, Dalston." The matter was brought to the consideration of the vestry; and the proceedings relative thereto are entered in the minutes of that body in the following terms:—

"In the matter of building in Priory Terrace erected by Mr. Tear.

"The clerk read the report of the surveyor of the 5th June, 1856.

*"Moved by Mr. Owen, and seconded by Mr. Edwards, that [*248 the chief surveyor be ordered to demolish the building erected by Mr. Tear beyond the regular line of buildings near Priory Terrace, Victoria Road, in accordance with the act 18 & 19 Vict. c. 120.

"Moved by Mr. Pearce as an amendment, and seconded by Mr. Beston, that Mr. Tear be summoned before the magistrate for the supposed infringement of the law.

"And upon a show of hands there appeared

"For the amendment, 6; against, 22. For the original motion, 24; against, 6.

"A division was demanded, and the names to be taken down, when there appeared,—

"For the original motion, 27 (naming them). For the amendment, 6 (naming them), Neuter, 5 (naming them).

"The chairman declared the original motion carried."

Between the commencement and the close of the proceedings on the said 17th June, forty-seven members of the vestry and no more had been in the place of meeting; but there was no evidence before the arbitrator that the said forty-seven members were present together at the said place of meeting. There was no evidence before the arbitrator to show how many of the forty-seven were present at either of the times when a show of hands was taken as aforesaid. He found as a fact, that, at the subsequent division, thirty-eight members of the vestry out of the said forty-seven were present.

The fact that the last-mentioned original motion had been carried, was communicated to the defendant as chief surveyor of the vestry, and he, on the 23d of June, sent to the plaintiff an extract from the minutes of the vestry, setting forth the terms of the motion, and stating the fact that it had been carried. He also *wrote to the plaintiff a letter [*249 bearing the same date, in the following terms:—

"Sir,—Having to carry out the resolution come to by the vestry (copy of which is herewith enclosed), I beg to state that I shall deem it my duty to supply you with every information required as to the acts of the people I shall employ to remove the materials, &c. I trust you will afford me every facility towards the proper removal of the same, as well as to shore up and leave the other portion in a secure workman-like state, in order that no further expenses be incurred or hereafter be required from you than is absolutely needed for duly removing what is required."

On the 24th of June, 1856, the defendant went with some workmen to the house to which the said motion so carried as aforesaid on the 19th of June applied, that is to say, to the house so erected by the plaintiff as aforesaid, saw the plaintiff there, and, after explaining that he had come there to demolish or set back the building as the case might require, pursuant to an order of the vestry, asked the plaintiff whether he would give him facilities for that purpose. The plaintiff refused to give any; and thereupon the defendant, by his servants on his behalf, in the bonâ fide execution of the said alleged resolution of the vestry of the 19th of June, 1856, took down so much of the said building as projected towards the north-east footpath beyond the wall of No. 1, Priory Terrace, facing the said footpath, committing no excess, and doing no unnecessary damage. The defendant, in fact, cut off a slice of the building towards Victoria Road, 18 feet wide, 22 feet high, and 8 feet deep. The building materials were placed by the defendant in the first instance within a hoard erected on the carriage-way in front of the house; and thence they were conveyed to a stone-yard belonging to
*250] the parish, in Fleming Street, Kingsland *Road, where they have since been. The arbitrator found as a fact, that there was space on the plaintiff's said premises on which the defendant might have stacked the said building materials after they had so been taken down and placed within the said hoarding; but that, if the plaintiff was entitled to remove them away, the stone-yard was a convenient place to remove them to. He found as a fact that the defendant removed the said building materials to the said stone-yard, and detained and still detains them there *as a security and pledge for the costs and expenses of so taking down or setting back the said building as aforesaid*, in the bonâ fide belief that he was and is entitled so to do under the said alleged resolution of the vestry of the 19th of June, 1856, and under no other resolution or order of the said vestry; and that the plaintiff could not have obtained the said materials back, without paying the said costs and expenses. He found as a fact that the said costs and expenses had never been demanded of the plaintiff; and that no account of them had ever been rendered to him. He also found as a fact, that the plaintiff never asked for such account, nor demanded that the said building materials should be delivered to him.

Early in the year 1856, one Hutchinson had contracted verbally with the plaintiff to take the said house and premises from the plaintiff for a baker's and confectioner's shop, for a term of twenty-one years, determinable, at the option of Hutchinson, at the end of seven or fourteen years, at a rent of 35*l.* per annum. By the terms of the contract, Hutchinson was to be let into possession at Midsummer, 1856; and the first quarter's rent was to be paid at Michaelmas, 1856; and he was to put in his own oven and shop-front. He was able and willing to perform his part of the contract; but declined, when he was informed that the building had
*251] been set back by the defendant; and has since *taken another house, and invested his capital in it. At the time of the contract with Hutchinson, the house had been commenced, and had been raised about three feet from the ground, except in front. The arbitrator found as a fact, that the contract between Hutchinson and the plaintiff contemplated a building having the proportion which was demolished by the defendant as aforesaid.

The plaintiff has done nothing towards reinstating or completing the said building since the acts complained of were committed.

A plan of Victoria Road was annexed to the case, and was to be taken as part thereof.

The plaintiff contended,—First, that the 143d section of the 18 & 19 Vict. c. 120, contemplates such buildings only as are new buildings within the Metropolitan Buildings Act, 18 & 19 Vict. c. 122; that the said building of the plaintiff was not a new building within that act, because the eastern and western walls thereof were carried up higher than the footings before and on the 1st of January, 1856; and therefore that the plaintiff's building was not within the said 143d section,—Secondly, that his said building was in Victoria Road, and that there was no regular line of buildings in Victoria Road,—Thirdly, that the regular line of buildings on the north-eastern side of Victoria Road was the north-eastern boundary of the footpath on the said north-eastern side,—Fourthly, that there was no valid legal order or command of the vestry authorizing the defendant to do what he did, or any part of it, because the motion to set back his premises made on the 17th of April was conclusively negatived by the operation of the 28th section, and all the subsequent proceedings of the vestry were based on the erroneous assumption that the said motion was carried; and, further, because the result of the show of hands on the said motion was an *act or resolution of the vestry never rescinded or altered in compliance with the 57th section,—Fifthly, that at all events, the removal of the building-materials to the stone-yard, and the detention of them there, were and are wholly unjustified, and the defendant's plea of justification to the second count not proved. [*252

The defendant contended, that the plaintiff's building was erected in violation of the 143d section; that the vestry were well warranted in making, and did make, a valid order on him, as their surveyor and servant, to demolish or set back the said premises; and that he had acted in all respects within the authority conferred on him by such valid order.

If the plaintiff was entitled to have the verdict entered for him only on the issues on the second count, the arbitrator found the damages to which he was entitled, to be 12*l.*

If the plaintiff was entitled to have the verdict entered for him only on the issues on the first count, but was only entitled to have damages for the demolition of the house, he found the damages to which he was entitled, to be 95*l.*

If the plaintiff was entitled to have the verdict entered for him on the issues on the first count only, but was entitled to indemnity for the loss of Hutchinson's contract, then he found the damages to which he was entitled, to be 165*l.*

If the plaintiff was entitled to have the verdict entered for him on all the issues, then he found the damages to which he was entitled, to be 107*l.*, or 177*l.*, according as he was or was not entitled to damages in respect of the loss of his said contract with Hutchinson.

Montagu Chambers, Q. C. (with whom was *Barnard*), for the plaintiff.—The first question is, whether the defendant was justified in demolishing the plaintiff's *premises by the 143d section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. That [*253

section enacts that, "no building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the regular line of buildings in the street in which the same is situate, in case the distance of such line of buildings from the highway do not exceed thirty feet, or within thirty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds thirty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway; and, in case any building be erected contrary to this enactment, it shall be lawful for the vestry or district board in whose parish or district such building is situate, to cause the same to be demolished or set back (as the case may require), and to recover the expenses incurred by them from the owner of the premises, in manner provided by this act." This provision, which came into operation on the 1st of January, 1856, contemplates that which shall be done in future. The 8th section of the Metropolitan Buildings Act, 18 & 19 Vict. c. 122, enacts that "a building shall be deemed to be new whenever the enclosing walls thereof have not been carried higher than the footings previously to the 1st of January, 1856: any other building shall be deemed to be an old building." The case shows that the building in question was an "old building;" for, it finds that the eastern and western walls close up to the footpath in Victoria Road had been carried up higher than the footings before the 1st of January, 1856. The plan shows the state of the buildings in the Victoria Road at the time the act came into operation. The court is called upon for the first time to say what is "the regular line of buildings in the street." Is this to be determined by reference to Nos. 1 and 2 Priory Terrace? or *254] by Nos. 3, 4, 5, 6, and 7? *or by Nos. 8 and 9? or by Nos. 1 and 2, Boundary Cottages? There is nothing, it is submitted, in the Local Management Act, or in the statements in the case, to interfere with the plaintiff's right to build close up to the footpath.

Then, as to the vestry proceedings,—it does not appear from the facts found by the arbitrator that the twenty-five vestrymen who voted for the demolition of the plaintiff's premises formed the majority of those present on the 17th of April. The resolution proposed at the first vestry meeting, on the 17th of April, was conclusively negatived by the show of hands, and the statute and by-law do not authorize a subsequent division or poll; they give the vestry the option to proceed by the one mode or the other, but not by both. And, assuming the resolution then come to, to have been valid, it was not acted upon, and those passed at the subsequent meetings were mere nullities.

At all events, the plaintiff is entitled to recover upon the second count. The removal of the materials to the stone-yard was clearly unjustifiable. [WILLES, J.—The defendant certainly had no right to insist upon a lien on them for the expenses.]

The plaintiff is entitled to recover all the damages assessed, and the amendment of the second count was properly made.

Macauley, Q. C. (with whom was *Raymond*), contrà.—[CROWDER, J., desired him to confine his argument to the first point, viz. whether the building in question was an "old building," and to the question raised on the second count.] The first point admits of two answers. In the first place, the arbitrator finds that the enclosing walls were not built before the 1st of January, 1856. The eastern and western walls were

not erected for the purpose of any building, but were mere *boundary walls to the piece of land. The agreement under which the [*255 plaintiff took the land from Clarkson was dated the 23d of February, 1856; and the plaintiff did not commence building his house until February. In the next place, though an "old building" for the purpose of the Metropolitan Buildings Act, it would not necessarily be so for the purpose of the Metropolitan Local Management Act. The two statutes are not in pari materiâ: they have totally different objects in view.

Then, as to the second count,—there is no statement therein of anything which amounts to a conversion. The asportation of the materials to a convenient place of deposit was perfectly justifiable. If the defendant was authorized to demolish the offending portion of the building, he was authorized to do all that was reasonably necessary to carry out that object. He could not leave the materials encumbering the highway: and he would have been guilty of a trespass if he had gone upon the plaintiff's premises to deposit them there. The arbitrator finds that the stone-yard was a convenient place to remove the materials to. [CROWDER, J.—Convenient for whom? He does not say that it was convenient for the use of the plaintiff.] He may fairly be assumed to have meant so: his finding has reference to the pleadings which were before him. Then it is said that the defendant detains the materials as a security and pledge for the costs and expenses of taking down the building. But the arbitrator has not found that the defendant *claimed* a lien upon the materials: and, if the act of removal was lawful, the mere *intention* to insist upon a lien could not make it unlawful. If a man distrains cattle damage feasant, the quality of the act could not be in any degree altered or affected by his having told some third person that he means to detain the cattle until the owner pays him *1000*l.* In Crowther *v.* [*256 Ramsbottom, 7 T. R. 654, it was held, that, in trespass for breaking and entering the plaintiff's close, and taking his goods, the defendant may justify under sufficient legal process, if he had it in fact at the time, although he declared then that he entered for another cause. And Lord Kenyon said: "I never understood that a man was bound to justify a distress for the cause which he happened to assign at the time it was made. If he can show that he had a legal justification for what he did, that is sufficient. A man may distrain for rent, and avow for heriot service." [CROWDER, J.—The taking the materials to the stone-yard was for the express purpose of claiming a lien. It is obvious he did that for his own purposes. I do not see how you can get over that.] If the defendant did no more than he had a legal right to do, what he *said* or *intended* does not affect the validity of his act: Stevenson *v.* Newnham, 13 C. B. 285 (E. C. L. R. vol. 76). [CROWDER, J.—That is the infirmity of your argument. The defendant had no right to remove the materials from the hoarding to the stone-yard.] There was no demand here: and this is eminently one of those cases where a demand and refusal are necessary. The asportation is mere aggravation: Woods *v.* Durrant, 16 M. & W. 149.† A mere wrongful asportation of a chattel does not necessarily amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect either of destroying or changing the quality of the chattel: Fouldes *v.* Willoughby, 8 M. & W. 540;† Simmons *v.* Lillystone, 22 Law J., Exch. 217. To

constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right: Heald *v.* Carey, 11 C. B. 977 (E. C. L. R. vol. 73). Here, the defendant was not *asserting a right: he was acting in the performance of a public duty.

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CROWDER, J.—I am of opinion that there must be judgment for the defendant on the first count, and for the plaintiff in the count in trover. As to the questions arising upon the first count, they arise under the 18 & 19 Vict. c. 120, and mainly under the 143d section. This being an act to regulate the building of streets, that section enacts that "no building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond *the regular line of buildings* in the street in which the same is situate, in case the distance of such line of buildings from the highway do not exceed 30 feet, or within 30 feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds 30 feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway: and, in case any building be erected contrary to this enactment, it shall be lawful for the vestry or district board in whose parish or district such building is situate, to cause the same to be demolished, or set back, as the case may require, and to recover the expenses incurred by them from the owner of the premises in manner provided by this act."(*a*) It appears from the case that there is a road called Victoria Road, with certain buildings on the north side,—to the extreme west Priory Terrace, consisting of nine houses, then Nos. 1 and 2, Boundary Cottages, and then another terrace consisting of twelve houses, called Portland Terrace; and to the extreme east three houses and other two in course of erection. To the west of Priory Terrace, there are also certain *houses numbered respectively 1, 2, 3, and 4, abutting on Marlborough Road. The end house, No. 4, marked A. on the plan, is divided from Victoria Road by a wall. It seems that a portion of the premises marked A. is skirted by that wall and a zinc flat. The premises erected by the plaintiff, marked B. upon the plan, are at the west end of Priory Terrace, and immediately behind the premises in Marlborough Road marked A. In erecting those premises, the plaintiff placed his house very near to the line of the footpath, and a considerable distance in advance of the line of any of the other houses. The defendant, in exercise of the authority conferred upon him as surveyor to the vestry under the 143d section of the act, has removed so much of the house as projected beyond the regular line of buildings in Victoria Road. The plaintiff insists that he had no right to do so. In the first place, it is contended that the building was not within the act at all; for that the 143d section applies to new buildings, and the 8th section of the Metropolitan Buildings Act, 18 & 19 Vict. c. 122, shows that this is not a new building. That section enacts that "a building shall be deemed to be new whenever the enclosing walls thereof have not been carried higher than the footings previously to the 1st of January, 1856: any other building shall be deemed to be an old building." The case finds that before the 1st of January, 1856, there were two walls, one at the east and the other at the west side of the plaintiff's land, which commenced at or near the

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(*a*) To be ascertained and determined by and recovered before two justices, s. 225.

footpath, and which had before that date been carried higher than the footings, and which subsequently became part of the house. In constructing the house, in the month of February, the then existing east and west walls before described were first reduced in height, but not taken down to the footings, and afterwards carried up to the full height of twenty-two *feet. The north wall, both footings and superstructure, was then built for the first time. The south wall has never had footings, as the house was intended for a baker's shop. The arbitrator therefore finds as a fact that the "enclosing walls" of the building so erected by the plaintiff had not been carried above the footings on or previously to the 1st of January, 1856. Now, the first answer given on the part of the defendant, is, that there is no connection between the two acts,—that there is nothing to show that the term "new building" in the 8th section of the 18 & 19 Vict. c. 122, is a definition of that referred to in the 143d section of the 18 & 19 Vict. c. 120. But, looking at the facts, it seems to me that the objection admits of this answer. At the time the act came into operation, the two walls called the east and west walls were not connected with any building: but they became so afterwards. Therefore, even if the 8th section of the Metropolitan Buildings Act did apply, the facts negative this being an old building; and, if improperly erected as regards the line of buildings in Victoria Road, it is within the 143d section of the 18 & 19 Vict. c. 120. Then it was said that the plaintiff was at liberty to build his house up to the footpath. It seems to me, however, that so to construe the act would be to make it utterly useless. The case finds that the houses in Priory Terrace, Boundary Cottages, and Portland Terrace, are built in symmetrical blocks close up to, *or at a distance of nine inches from*, an imaginary line drawn from No. 1, Priory Terrace, to No. 12, Portland Terrace. From this it is argued, on the part of the plaintiff, that there is no "regular line of buildings" in this road. The arbitrator, however, finds that there is a regular line of buildings,—which need not be a mathematical line,—and that the house in question was built beyond that line. The object of this *part of the act evidently was the maintaining an appearance that should be ornamental. It seems to me that the case falls within the 143d section, and that the vestry were right in taking steps to demolish the offending structure. Then certain questions are raised as the proceedings at the vestry meetings. It is said that the resolution proposed at the meeting of the 17th of April was conclusively negatived, by reference to the 28th section of the act, and the by-law made under the authority of the 202d section. By one of those by-laws made for regulating the proceedings of vestries, it is provided that "all questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded." At the meeting of the 17th of April, a resolution was proposed to the effect that Tear be directed to set back the premises illegally built beyond the regular line of buildings, within seven days; and, in case of non-compliance, that the surveyor be directed to cause the same to be demolished. A show of hands took place, when there appeared fourteen for the motion and fourteen against it. A division was then demanded, when there appeared to be a majority of seven in favour of the resolution. It was insisted that upon the show of hands there was an end of the resolution; for, that the true meaning of the by-law is, to give the parties the option to

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vote by show of hands or by division, and that, having taken the one course, they could not afterwards resort to the other. That would be contrary to all one's experience. Elections of members of parliament are invariably made by show of hands, followed by a poll. Nothing can be more clear. The proceedings were perfectly good, and the resolution valid within the act. Then it is said, that, assuming the resolution at that meeting to have been a valid one, it was not the resolution that was acted upon. It appears that there was another vestry meeting held
*261] on the 8th of May, when, it being moved *that the resolution of the 17th of April be carried into execution, an amendment was proposed that the plaintiff should have fourteen days' notice to set back his premises; and the amendment was carried. This made an end of the former resolution: and the plaintiff had the benefit of the additional fourteen days' delay. The plaintiff having failed to obey this last injunction, it became necessary to convene another meeting of the vestry. Accordingly, on the 19th of June, another meeting was held, when it was proposed that "the chief surveyor be ordered to demolish the building erected by Mr. Tear beyond the regular line of buildings near Priory Terrace, Victoria Road, in accordance with the act 18 & 19 Vict. c. 120;" and this was carried by a majority of eighteen. That was a perfectly separate motion. The result was communicated to the plaintiff, and, on the 24th of June, the building was demolished. I think the defendant was perfectly justified, and consequently that he is entitled to judgment upon the first count. Then comes the count in trover. I cannot help regretting that our decision should turn upon so small a matter. I cannot construe the finding of the arbitrator otherwise than as I have already suggested in the course of the argument. The building having been taken down, it appears that the materials were at first placed within a hoarding in the carriageway, and that they were afterwards conveyed to a stone-yard belonging to the parish, which the arbitrator found to be a convenient place to remove them to. The arbitrator, however, further finds "that the defendant removed the said building materials to the said stone-yard, and detained and still detains them there *as a security and pledge for the costs and expenses of so taking down or setting back the said building as aforesaid*, in the bonâ fide belief that he was and is entitled so to do under the said
*262] alleged resolution of *the vestry of the 19th of June, 1856, and under no other resolution or order of the said vestry; and that the plaintiff could not have obtained the said materials back without paying the said costs and expenses." I think it is impossible to avoid coming to the conclusion that the defendant has been guilty of a conversion. It is said that the fact of the defendant having intended to claim a lien on the materials for his costs and expenses was immaterial so long as that intention was not communicated to anybody. We must, however, give a fair and reasonable construction to the finding of the arbitrator. Reliance is also placed upon the finding of the arbitrator that the stone-yard was a convenient place for the deposit of the materials. But it is rather vague to say that any place is convenient to stow away property of this sort, that places it out of the control of the owner. There is nothing to show that the materials were carried to the stone-yard for the benefit of the plaintiff: on the contrary, it is abundantly clear that the defendant had an eye to his own benefit only. There

must, therefore, be a verdict for the plaintiff on the second count, for 12*l.*

WILLES, J.—I am of the same opinion. It appears to me that there is nothing in the 8th section of the 18 & 19 Vict. c. 122 to take the building in question out of the operation of the 143d section of the 18 & 19 Vict. c. 120: the walls called the east and west walls were mere boundary walls, and not external walls of a building. It is said that there does not appear to have been any regular line of building, in the place in question, within the meaning of the 143d section of the Metropolis Local Management Act. That is a question of fact. The "regular line of buildings" mentioned in that section cannot possibly mean a geometrical line; it must mean substantially such a *line as shall preserve uniformity of appearance. The arbitrator, as it [*263 seems to me, has disposed of this question, by finding that there is in point of fact a regular line of buildings from No. 1, Priory Terrace, to No. 12, Portland Terrace. Then it is said that the surveyor had no authority to remove the building, because, when the resolution was put to a show of hands at the first vestry meeting, and the numbers were equal, that, according to the true construction of the by-law, disposed of the matter, and there could not legally be a poll. The rule upon this subject is well stated by Sir William Scott, in a case of Anthony *v.* Seger, 1 Hagg. Consist. R. 9, 13,—"Where a poll is demanded, the election commences with it, as being the regular mode of popular elections; the show of hands being only a rude and imperfect declaration of the electors. It often happens, that, on a show of hands, the person has a majority who on a poll is lost in a minority; and, if the parties could afterwards recur to the show of hands, there would be no certainty or regularity in elections. I am of opinion, therefore, that, when a poll is demanded, it is an abandonment of what was done before, and that everything anterior is not of the substance of the election, nor to be so received." It is clear, therefore, that a demand of a poll or division does away with the previous show of hands. That objection cannot be sustained. And this seems to me to dispose of the first count in favour of the defendant. As to the second count, I apprehend that a person is guilty of a conversion, if he takes away the goods of another for the purpose of depriving that other of the use of them and acquiring the use of them himself. It seems to me that that was the defendant's object in removing the building-materials to the stone-yard,—to enable him the better to enforce his claim of lien. That clearly was a wrongful deprival of the *plaintiff of the use of his [*264 goods. The circumstance of the materials being taken in order to enforce an unfounded claim of lien, distinguishes the cases from those cited. There will, therefore, be judgment for the defendant upon the first count, and for the plaintiff on the second count, for 12*l.*

Judgment accordingly.

JOHN PEACOCK, Appellant; THE QUEEN, Respondent. *April* 28.

Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior courts under the 20 & 21 Vict. c. 43, s. 2, although it be the last day.

THIS was an information preferred by James Bell, inspector of police,

against John Peacock, an alehouse-keeper; for that, "on the 20th of December, 1857, at Sutton Bridge, in the parish of Sutton St. Mary, in the parts of Holland, Lincolnshire, the said John Peacock, being then a beer-house keeper, and duly licensed to sell beer, ale, and porter and excisable liquors by retail to be drunk and consumed in his house and premises there situate, under the provisions of the statutes in that case made and provided, did keep his said house and premises (the said day being Sunday) open for the sale of beer after the hour of eleven o'clock at night, to wit, at thirty-five minutes past eleven o'clock at night of the same day; being in the said parish of Sutton St. Mary, the population of which, according to the last parliamentary census, exceeded two thousand five hundred persons; contrary to the form of the statute in such case made and provided."

After hearing the parties, and the evidence adduced by them, the magistrates at a petty session held on the 30th of December, 1857, *265] convicted the said John *Peacock, as an alehouse-keeper, of the said offence, under the 18 & 19 Vict. c. 118, s. 1, and adjudged him to forfeit and pay the fine or penalty of 5s. and costs.

The said John Peacock, being dissatisfied with the said determination as being erroneous in point of law, applied for a case for the opinion of this court pursuant to the 20 & 21 Vict. c. 43: whereupon the justices stated the following case:—

"The defendant having appeared upon summons before us to answer to the said information, it was thereupon proved on the part of the said prosecutor, by the evidence of a police constable, that the said John Peacock was keeping and carrying on the business of an alehouse keeper at an inn called The Crown, situate at Sutton Bridge aforesaid; and that, about half past eleven o'clock on the night of Sunday, the 20th of December last, the police on duty, being attracted by a noise inside, entered the said alehouse, and there found four men in a lower room,—one of them (one of the strangers after-mentioned) having a glass of rum-and-water in his hand at the time, and being drunk and noisy; that three of such four persons were strangers, and the fourth was known to the police to be a resident at Sutton Bridge aforesaid, but not a lodger in the said alehouse kept by the said John Peacock.

"It was alleged in reply, by the said John Peacock in person, but no proof tendered or given by him, that the three strangers in question were travellers resting there for the night with droves of beast, which they were taking into Norfolk for sale: and it was not disputed by him that the other party was a resident at Sutton Bridge, and not a lodger in his said house; but it was asserted that that party neither was nor had been drinking, and set up that he was there only for the purpose of reading the newspaper and of conversation with the drovers. Peacock *266] further objected that he was an old *licensed innkeeper, and not a mere retail beer-house keeper as stated in the information and summons: whereupon we, the undersigned, did adjudge and determine that the said John Peacock was guilty of the offence so charged against him; and that his objection to the character in which he had been summoned, was removed under the provisions of the statute 11 & 12 Vict. c. 43, s. 1, by his personal appearance before us: and we did convict him accordingly in the mitigated penalty of 5s., besides costs, amounting to the sum of 18s.

"If the court shall be of opinion that the said John Peacock was duly and properly convicted of the said offence, then the conviction shall be confirmed. But, if the court shall be of a contrary opinion, then the said conviction shall be quashed."

Tompson Chitty appearing to support the appeal,

Beasley, for the respondents, objected that the application to the justices for a case was made too late, the adjudication having taken place on Thursday, the 30th of December, 1857, and a case not having been asked for until Monday, the 3d of January, 1858; whereas, the statute requires it to be done "within three days" after the determination.

Chitty submitted that the objection was waived by the appearance of the respondents.

CROWDER, J.—I think we have no jurisdiction to hear this appeal. The 2d section of the 20 & 21 Vict. c. 43, provides, that, after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force *or hereafter to be made, either party to the proceeding before the said justice or justices [*267 may, if dissatisfied with the said determination, as being erroneous in point of law, apply in writing *within three days after the same* to the said justice or justices to state and sign a case, &c. Unless that condition has been complied with, we have no power to entertain the matter.(*a*) The statute giving that number of days, and saying nothing about Sunday being excluded from the computation, as in some of the rules of court,(*b*) it must be reckoned as one of the three days. The appellant ought, therefore, to have applied to the justices on the Saturday.

WILLES, J.—The case of Rowberry *v.* Morgan, 9 Exch. 730,† is precisely in point. The 27th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, empowers a plaintiff, in case of non-appearance by the defendant, where the writ of summons is endorsed in the special form given by the act, on filing an affidavit of personal service, &c., at once to sign judgment: "and the plaintiff may, upon such judgment, issue execution *at the expiration of eight days from the last day for appearance:*" and it was held in that case, that, where *Sunday is the last of such eight days, it is to be reckoned in the [*268 computation as one of those days, and consequently that an execution issued on the Monday was regular. In the course of the argument there, Martin, B., referred to a case of The Queen *v.* The Justices of Middlesex, 7 Jurist 396, where one of the questions turned upon the 4 G. 4, c. 95, s. 87, the turnpike act, which requires the notice of appeal to be served within six days after the cause of complaint; and it was held, that, the conviction being on the 2d of May, service

(*a*) See Norton, app., The Town Clerk of Salisbury, resp., 4 C. B. 32 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 538; Pring, app., Estcourt, resp., 4 C. B. 73, 1 Lutw. Reg. Cas. 543; Clarke, app., Beaton, resp., 4 C. B. 76.

(*b*) See the 174th rule of Hilary Term, 1853 (13 C. B., p. 40) (E. C. L. R. vol. 76), which provides, that, "in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also."

of the notice of appeal upon the 9th, the 8th being Sunday, was not in time.(*a*)

BYLES, J.—I am of the same opinion. Sunday, at common law, is just like any other day. By the 11 G. 4 & 1 W. 4, c. 70, s. 6, Trinity Term was made to commence on the 22d of May, and "the first essoign or general return day" was "the fourth day before the day of the commencement of the term, both days being included in the computation." Where the 22d of May happened to be a Sunday, for the purpose of casting essoigns, it was still considered the first day of the term.

Beasley, for the respondents, asked for costs, referring to the 6th section of the statute, which places the costs at the discretion of the court.

WILLES, J.—That only applies where the court has jurisdiction. Here, we dismiss the appeal because we have *no* jurisdiction.

Appeal dismissed.

(*a*) And see The Queen *v.* The Justices of Middlesex, 17 Law J., M. C. 111. By the 4th section of the 7 & 8 Vict. c. 101, notice of an appeal against an order of affiliation *is required to be given "within twenty-four hours after the adjudication." It was held, that, in computing the twenty-four hours for that purpose, Sunday is to be *excluded*; and, consequently, where the order was made on Saturday, a notice of appeal given on Monday was held sufficient. In Rawlins, app., The Overseers of West Derby, resp., 2 C. B. 72 (E. C. L. R. vol. 52), the last day for giving notices of claims under the Registration of Voters Act, 6 & 7 Vict. c. 18, falling on a Sunday, a notice of claim served upon the overseer on that day was held good.

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In re ROBERT STIRLING NEWALL, and GEORGE ELLIOT and RICHARD ATTWOOD GLASS. *April* 30.

The office of the provisional specification, under the 6th section of the 15 & 16 Vict. c. 83, is only to describe generally and fairly the *nature* of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out, as in the complete specification under s. 9.

A. was the inventor of "improvements in apparatus employed in laying down submarine electric telegraph wires." In the provisional specification filed pursuant to the 6th section of the 15 & 16 Vict. c. 83, the invention was thus described,—"The cable or rope containing the insulated wire or wires is passed round a cone, so that the cable in being drawn off the coil is prevented from kinking by means of the cone, and there is a cylinder on the outside which prevents the coil from shifting in its place." In the complete specification, after describing the invention in the same terms, the inventor proceeded to say,—"When the wire or cable is to be laid down, I place over the cone an apex or top which is conoidal or conical, and *around this I suspend several rings of iron or other metal by means of cords, so as to admit of adjustment at various heights over the cone. The use of these rings is, to prevent the bight of the rope from flying out when going at a rapid speed, and the combination of these parts of the apparatus prevents the wire or cable from running into kinks:*" and the claim at the end was thus,—"What I claim as my invention is,—first, coiling the wire or cable round a cone,—second, the supports placed cylindrically outside the coil round the cone,—third, *the use of rings in combination with the cone as described:*"—Held, that the validity of the patent was not affected by the omission of all mention of the metal rings in the provisional specification.

And held, that the substitution by B. of a *cylinder* having a domed or hemispherical top, for the cone or the cone with the conoidal apex in A.'s apparatus,—A.'s apparatus and B.'s being used for the same purpose, and in nearly the same manner,—was evidence, and strong evidence, of infringement.

A necessary and unavoidable disclosure of the invention to others, if made in the course of mere experiments, is not such a publication as will avoid the subsequent grant of a patent,—though the same disclosure, if made in the course of a profitable use of an invention *previously ascertained to be useful*, would be a publication: but an experiment performed in the presence of

others, which not only turns out to be successful, but actually beneficial in the particular instance, is not necessarily a publication, so as to constitute a gift of the invention to the world.

A. had invented an improved apparatus for laying down submarine telegraph wires; and, after some unsatisfactory and indecisive experiments at the works on shore, having entered into a contract with government for laying down a telegraphic cable in the Black Sea (the mode of doing it being left to his discretion), fitted a vessel with his improved apparatus, and used it successfully on that occasion, and immediately afterwards took out a patent for the invention: —Held, that what was done in the Black Sea, having been done merely by way of experiment, though productive of profit to A., did not amount to a publication, so as to preclude him from afterwards obtaining the protection of a patent for his invention.

By a memorandum of agreement made and entered into the 9th of July, 1856, between Robert Stirling Newall, of Gateshead-on-Tyne, wire-rope and submarine telegraph manufacturer and contractor, of the one *part, and George Elliot, and Richard Attwood Glass, of East Greenwich, in the county of Kent, wire-rope and submarine telegraph manufacturers and contractors, of the other part,— reciting that "whereas, on the 14th of May, 1855, the said R. S. Newall obtained letters patent of that date to be granted to him for an invention under the title of 'improvements in apparatus employed in laying down submarine electric telegraph wires,' and such letters patent were duly sealed on the 3d of August, 1855, the said invention being protected by a provisional specification left by the said R. S. Newall at the office of the commissioners of patents, with his petition, on the said 14th of May, 1855, and a specification thereof was duly filed on the 14th of November, 1855, pursuant to the proviso for that purpose contained in the said letters patent: And whereas the said G. Elliot and R. A. Glass have lately shipped on board the ship Propontis a certain apparatus to be employed in laying down submarine electric telegraph wires between Newfoundland and the opposite coast of North America, which is alleged by the said R. S. Newall to be an infringement of the said letters patent, but which is denied by the said G. Elliot and R. A. Glass; and the said G. Elliot and R. A. Glass allege that the said letters patent are illegal and void: And whereas the said R. S. Newall having filed a bill in the Court of Chancery with a view to an injunction being obtained, proceedings in the said suit were abandoned only upon the said G. *Elliot and R. A. Glass agreeing to refer the whole matter to arbitration, as after provided:" It was witnessed, "that, in pursuance of the said agreement, the said R. S. Newall did thereby, for himself, his executors and administrators, promise and agree with and to the said G. Elliot and R. A. Glass, their executors and administrators, and the said G. Elliot and R. A. Glass did, and each of them did thereby, for himself and their and his executors and administrators, promise and agree to and with the said R. S. Newall, his executors and admiinstrators, in manner following, that is to say, that he the said R. S. Newall, his executors and administrators, and they the said G. Elliot and R. A. Glass, their executors and administrators, should and would on his and their respective parts, save as thereinafter appeared, abide by and well and truly observe and keep the award, order, arbitrament, and determination of T. W., Esq., barrister-at-law, of and concerning the matters aforesaid, so that the said arbitrator, &c., &c.: And it was agreed, that, in case the arbitrator should be of opinion that there had been an infringement of the patent by the said G. Elliot and R. A.

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Glass, he should give the said R. S. Newall such compensation as he should think the said G. Elliot and R. A. Glass ought to pay for the use of the apparatus then on board the Propontis, in laying down such submarine telegraph wires as aforesaid: And it was agreed that the arbitrator should, if required by either party, state a special case, so as to enable the parties to take the opinion of one of the superior courts of law on any point of law: And it was thereby further agreed and declared between and by the said parties thereto, that the costs and expenses of the said submission and reference, and of the award to be made in pursuance thereof, should abide the event," &c., &c.

*272] The arbitrator having taken upon himself the *burthen of the reference, and having duly weighed and considered the several allegations of the said parties, and also the proofs, vouchers, documents, and other matters which had been given in evidence before him, made and published his award in writing of and concerning the matters referred to him, in manner following, that is to say,—he did declare that the said letters patent were not illegal or void; and he did further award and adjudge that the defendants had infringed the said letters patent; and he did further award, order, and direct that the defendants pay to the plaintiff the sum of 50*l.* as a compensation for the use of the said apparatus on board the Propontis in laying down the said submarine telegraph wire: And, in further pursuance of the said agreement of reference, being required by the parties respectively, he did state the following case for the purpose of enabling the parties to take the opinion of the Court of Common Pleas on the points of law therein stated:—

The plaintiff carries on business at Gateshead, and, in the course of such business has made and laid down several submarine cables for telegraphic purposes. The defendants carry on business at East Greenwich, and, in the course of such business, have also made and laid down submarine cables for telegraphic purposes.

The plaintiff, on the 15th of December, 1854, entered into a contract with the British government to lay down a telegraphic submarine cable between Varna and Balaklava, and Balaklava and Eupatoria, in the Black Sea; in the execution of which contract, the apparatus, the subject of the letters patent dated the 14th of May, 1855, was employed, such employment taking place before the date of the said letters patent.

A copy of the provisional specification filed on the application for such *273] letters patent, and of the *specification filed in pursuance of the usual condition contained in such letters patent, was annexed to the award, and was to be taken as part thereof.

Previously to the making of the contract for and the laying down the Varna cable by the plaintiff, submarine cables for telegraphic purposes had usually been coiled in one or more oval or elliptical coils, in the hold or fore and aft of vessels, such coils being made as large as the vessel would permit. These coils were supported on the outside by the part of the vessel with which the coil came in contact, and also occasionally by stays at other parts of the coil where the coil was not in contact with the sides of the vessel; but these coils were usually without support in the interior: in one instance, however, guano bags, and, in another instance, a solid cylinder, had been introduced as a core to fill up and wedge the interior of the coil, and to prevent it from shifting by the

motion of the vessel; but such external and internal supports were removed previously to the uncoiling or laying of the cable, and were not employed or adapted for the purposes described in the specification of the said patent.

It had been the practice, before the date of the said contract and letters patent, to coil ropes and cables on or about cones or cylinders, in the course of manufacture; also, telegraph cables had been coiled in circular tanks, such coils being supported at their exterior by the vertical side of the tank, and at their interior by a cylindrical brick pier whereby the coils were preserved in a proper form, and capable of being subjected to water and other experimental operations previous to the cable being removed into and stowed away in the vessel for the purpose of being laid down. The successive layers of such coils were usually tied together for the purpose of preventing the different layers being interlaid, and also to retain the successive layers in *their places. [*274
In the laying of these cables, one end of the cable was passed out from the hold through the hatchway, or through an opening in the deck, to and through the break apparatus, and made fast to the shore, the cable being drawn out of the hold as the vessel passed onwards to and from the points between which the cable was to be laid. As the cable was so drawn out from the coil by the motion of the vessel, men were employed to cut the fastenings of the successive layers of coils, and to handle the cable so as to prevent kinks in the cable as it passed from the coil, the effect of such kinks being to destroy or materially to interfere with the insulation, and it being necessary, should a kink occur, to stop the operation of laying the cable, and cut out the kink, and join the two severed portions of the cable. The uncoiling of the cable for the purpose of paying out and of laying down was attended with danger, as the men were liable to be caught in the bight of the rope, also the rate at which the cable could be coiled and laid down depended to some extent upon the facility with which the men so employed could handle the cable in the process of uncoiling. This service required a great number of smart active men, who were paid a higher rate of wages than for other ordinary services.

On the 18th of December, 1854, the plaintiff entered into a contract with the government to lay down and establish an electric telegraph communication between Varna and Balaklava and Balaklava and Eupatoria, and subject to the following amongst other conditions,—the government to appoint an experienced naval officer to accompany the plaintiff's vessel, who would certify as to the shipment of the cable: the satisfactory completion also to be certified by an engineer.

In the course of the preparations for carrying out this contract, a cone was constructed with poles on the *works of the plaintiff, [*275
and a small cable coiled round such cone, and drawn off at different speeds, for the purpose of ascertaining the effect on the kinking; but the cable was not spread out and formed into a flat coil, as on board the vessel for the laying; and the experiment was stated not to have been satisfactory, or sufficient to dispense with the necessity of an experiment on a larger scale as to the utility of a cone in the laying of a submarine cable, or to have fortified the judgment of the plaintiff to a greater extent than he was already fortified by theoretical considerations as to the utility of a cone in laying a cable at sea, and in deep water,

under the circumstances ordinarily attending the laying a submarine telegraph cable. This experimental cone was made in the works of the plaintiff, from which the public were excluded, and came to the knowledge of many persons employed in those works; but it did not appear to have come to the knowledge of the public generally, or to have been in use by any other persons, or in any other manner than for the purpose of such experiment.

The Varna cable was made at the works of the plaintiff at Gateshead, and shipped from the wharf of those works into a vessel called the Black Sea, the property of the plaintiff. The vessel was fitted with a cone and external supports, as described in the specification. The cable was coiled round such cone, the coil being supported at its outsides by vertical supports arranged in a circle, as described in the specification. The Black Sea, with the cable so coiled in the hold, started on her voyage, but, meeting with an accident from bad weather, was compelled to put into the Thames; and the cable was transferred from the Black Sea to the Argus, and formed into a coil, and coiled about a cone, and supported at its exteriors in the same manner as in the Black Sea.

*276] *Precautions were taken to prevent what was going on at the works of the plaintiff becoming known; and precautions were taken to conceal the fact of the Black Sea being in the Thames: but, during the original shipment of the cable, and during its transference from the Black Sea to the Argus, various persons other than those on board in the employ of the government and of the plaintiff, visited the Black Sea and the Argus; and such persons had the means of becoming acquainted with the apparatus so constructed: but it did not appear that any use was made of such knowledge, or that an apparatus consisting of a cone about which the cable was coiled, or of a cone in combination with external supports, was in use by others than the plaintiff before the date of the said letters patent, or by the plaintiff before the date of the said letters patent, except in executing the contract as hereinafter mentioned.

The Argus, with the cable so stowed, sailed for the Black Sea on the 1st of March, 1855. On her arriving there, the top of the cone and rings, as described in the specification, were applied to and adjusted, and the laying down of the cable was completed on the 26th of April, 1855. The apparatus described in the specification of the letters patent of the 15th of May, was employed in laying down such cable under the contract of the 15th of December, 1854. The plaintiff received an agreed or stipulated sum for the whole contract, the laying the cable under that contract, and the means or apparatus to be employed in the execution of that contract, being left to the plaintiff's choice and discretion.

The said letters patent were applied for by the plaintiff in accordance with the intention previously entertained, of applying for such letters patent in case the apparatus should prove successful in laying down the cable. The use of the said apparatus enabled the cable to be laid with

*277] fewer hands than the submarine *cables previously laid, and without the occurrence of any kinks.

The defendants, in May, 1856, fitted a vessel called the Propontis, with a cylinder having a domed or hemispherical top, and fastened to the bottom of the vessel, with an outside cylinder of vertical supports

arranged in a circle, and also fixed to the vessel. A submarine cable was coiled round this cylinder, the outside of the coil being supported by the vertical supports arranged in a circle or outside cylinder; the coil about the cylinder being thereby prevented from shifting. The cable, on being laid down, was passed through a hole in the deck and a hawse-tube, and another apparatus of the ordinary description, and drawn up against the cylinder as the laying down proceeded. The cylinder with the domed top assisted the paying out, and diminished the tendency of the cable to kink in the paying out and laying down, in the same manner, though not so perfectly, as a cone; and the outside cylinder or supports prevented the coil from shifting.

The defendants did not use any ring or rings, as described in the plaintiff's specification, adjustable to the height of the coil as the cable was payed out. The length of the cable laid by the defendants by the use of this apparatus was about 85 miles. The plaintiff was the first to use an outside cylinder, that is to say, vertical supports arranged in a circle and fixed to the vessel, in combination with a cone or internal cylinder about which the cable was coiled; and the coil being prevented from shifting in its place by the outside cylinder, and the cable as it payed out passing up against the cylinder: and such a combination was an improvement in the apparatus in use for laying down submarine telegraph cables before the laying of the Varna cable by the plaintiff.

*Apparatus for laying down a telegraphic cable, in which the cable was to be coiled about and drawn off a cylinder, and supported externally by cylindrical supports, was designed in the year 1852, as preparatory to laying down a submarine telegraphic cable, and drawings were made of such apparatus; but such apparatus was not published or used before the date of the plaintiff's patent. [*278

It was contended, on behalf of the defendants, as matters of law,—first, that the use of supports placed cylindrically outside the coil round a cylinder, could not be an infringement of the above letters patent,—secondly, that the letters patent were invalid, because the provisional specification contained no description of or reference to the rings described and claimed in the specification,—thirdly, that the letters patent were invalid by reason of a publication during the operations in the Black Sea and the Argus respectively, or one of them, of a material part of the invention claimed,—fourthly, that the letters patent were invalid, by reason of the use by the plaintiff prior to the date of the letters patent of the apparatus for which the letters patent were granted, in executing a contract for profit, under the circumstances above stated.

The contrary was contended on behalf of the plaintiff: and the arbitrator decided each of the above points of law in favour of the plaintiff.

The title of the letters patent was,—"Improvements in apparatus employed in laying down submarine electric telegraph wires." They were sealed on the 3d of August, 1855, and dated the 14th of May, 1855.

The provisional specification left by the inventor at the office of the commissioners of patents, with his petition, on the 14th of May, 1855, was as follows:—

"I, Robert Stirling Newall, of Gateshead, do hereby declare the nature of the invention for 'Improvements *in apparatus employed in laying down submarine electric telegraph wires' to be as follows:— [*279

"This invention consists of apparatus combined and acting in the following manner:—The cable or rope containing the insulated wire or wires is passed round a cone, or, if it is a long cable, round several cones, so that the cable, in being drawn off the coil, is prevented from kinking, by means of the cone; and there is a cylinder on the outside, which prevents the coil from shifting in its place. The cable passes over a pulley above the cone, and on to a break-wheel, round which it takes several turns, to obtain sufficient holding; and from the break-wheel it passes over the stern of the vessel on board which the cable or rope is placed: or, I use two or more break-wheels, the one behind the other; the cable or rope comes up from the hold of the vessel, and round the first break-wheel several times, then on to the second break-wheel, round which it also takes several turns. When the break is applied to the first wheel, it increases the friction on the second, and so on, according to the number of break-wheels used: or, I use two break-wheels coupled together either by spur-gear or cranks and connecting-rods; the cable in such case passes round only a part of the circumference of each. There are grooves in the wheels, which guide the cable or rope from one to the other, and prevent its getting foul; or, a guide is used to push the cable from one side of the wheel to the other, so as to keep one part from riding over another."

The specification filed in the Great Seal Patent Office on the 14th of November, 1855, in pursuance of the conditions of the letters patent, was as follows:—

"To all to whom these presents shall come, I, Robert Stirling Newall, of Gateshead, send greeting:

*280] "Whereas, Her most excellent Majesty, Queen *Victoria, by Her letters patent, bearing date the 14th of May, 1855, in the eighteenth year of Her reign, did, for Herself, Her heirs and successors, give and grant unto me, the said Robert Stirling Newall, Her special license that I, the said Robert Stirling Newall, my executors, administrators, and assigns, or such others as I, the said Robert Stirling Newall, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might make, use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an invention for 'Improvements in apparatus employed in laying down submarine electric telegraph wires,' upon the condition (amongst others) that I, the said Robert Stirling Newall, by an instrument in writing under my hand and seal, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent Office within six calendar months next and immediately after the date of the said letters patent:—

"Now know ye, that I, the said Robert Stirling Newall, do hereby declare the nature of the said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement thereof, that is to say:—

"This invention consists of apparatus combined and acting in the following manner:—The cable or rope containing the insulating wire or wires is passed round a cone, or, if it is a long cable, round several cones, so that the cable in being drawn off the coil is prevented from

kinking, by means of the cone; and there is a cylinder on the outside, which prevents the coil from shifting in its place. The cable passes over a pulley above the *cone, and on to a break-wheel, round which it takes several turns, to obtain sufficient holding; and [*281 from the break-wheel it passes over the stern of the vessel on board which the cable or rope is placed: or, I use two or more break-wheels, the one behind the other. The cable or rope comes up from the hold of the vessel, and round the first break-wheel several times, then on to the second break-wheel, round which it also takes several turns. When the break is applied to the first wheel, it increases the friction on the second, and so on, according to the number of break-wheels used: or, I use two break-wheels coupled together either by spur-gear or cranks and connecting-rods: the cable in such case passes round only a part of the circumference of each. There are grooves in the wheels, which guide the cable or rope from one to the other, and prevent its getting foul; or a guide is used to push the cable from one side of the wheel to the other, so as always to keep one part from riding over another. The greatest difficulty in laying down submarine telegraph wires or cables hitherto has been to limit the speed in paying them out; arising from the necessity of the leading off part of the coil being kept clear of the others, by a great number of men handling it, to prevent its getting into kinks, or becoming entangled one part with another. This is remedied by coiling the wire or cable round a cone (or several cones, if required), so that the wire in being drawn off the coil is prevented from kinking by means of the cone. The apparatus I employ is shown in the accompanying drawings, which represent a section and plan. A., B., C., D., is the cone: it is formed of wood, or it may be of iron, so as to present an even surface on the outside, so that the wire, in passing round it, may not be caught by any projection. This cone is firmly fastened to the bottom of the vessel, and reaches at least as high as the top of the coil. Around the *cone is formed a cylinder or series of uprights *m*., strongly fastened to the bottom and deck, so as to prevent the [*282 coil of wire or cable which is coiled round the cone from shifting in its place. A strong iron ring or hoop is fastened outside the supports, to brace them together, at *n*. Over the cone is placed a pulley, one side of it being in a line with the axis of the cone.

"At a convenient distance between the cone and the stern of the vessel, is placed either one or two break-wheels, depending on the weight of wire or cable hanging over the stern, and the power of the break-wheel (which must be sufficient to prevent the cable from running out when the ship or vessel is passing over the greatest depth of water), so that by easing the break the wire may be payed out at the same speed, or nearly so, as the vessel is passing over the ground. I prefer the diameter of the break-wheel to be about eight or nine feet, and arranged in a frame-work, as shown in the drawing. The cable is carefully coiled round the cone in horizontal layers, beginning from the outside next the cylinder, and coiling towards the cone. When the space is filled up, the bight of the rope is taken to the outside of the coil at *b*, and another layer is coiled, and so on, until the whole length is coiled round the cone.

"When the wire or cable is to be laid down, I place over the cone an apex or top, which is conoidal, as shown in the drawing, or conical, and

around this I suspend several rings of iron or other metal, by means of cords, so as to admit of adjustment at various heights over the cone, as at *c*. The use of these rings is, to prevent the bight of the rope from flying out when going at a rapid speed; and the combination of these parts of the apparatus prevents the wire or cable from running into kinks. The two rings nearest the coil are lowered, so as to be about six inches and a foot respectively above the coil as it is being payed out.

*283] *"When the wire or cable is to be payed out, the end is led up through the rings over the pulley and round the break-wheel; or, if two break-wheels are used, it is led round the first one several times to obtain adhesion, then round the second, and over the stern of the vessel to the shore, where it is made fast. The vessel then goes ahead, and the wire is drawn from the coil, sufficient friction being applied by the handle of the break-wheel or wheels to keep the wire or cable tight.

"Having thus described the nature of the apparatus I employ in laying down submarine electric wires, what I claim as my invention is,—first, coiling the wire or cable round a cone,—second, the supports placed cylindrically outside the coil round the cone,—third, the use of the rings in combination with the cone, as described."

M. Smith, Q. C. (with whom was *W. Stokes*), for the plaintiff.—1. The arbitrator must be taken to have found that the cylinder used by the defendants is an infringement of the plaintiff's patent. The only question, therefore, on this part of the case, is, whether the use of "a cylinder having a domed or hemispherical top, and fastened to the bottom of the vessel, with an outside cylinder of vertical supports arranged in a circle, and also fixed to the vessel," could as a matter of law amount to an infringement. Now, the description of the plaintiff's invention in the specification is as follows:—"The cable or rope containing the insulating wire or wires is passed round a cone, or, if it is a long cable, round several cones, so that the cable in being drawn off the coil is prevented from kinking, by means of the cone: and there is a cylinder on the outside which prevents the coil from shifting in its place." There is no substantial difference between these two:—

*284] *the object and purpose and the effect of both are precisely the same: the substitution of the cylinder for the cone is a mere transparent mechanical equivalent. If this would be any evidence of infringement to go to a jury, the finding of the arbitrator upon this point is clearly correct.

2. The next question is, whether the patent is invalid because the provisional specification contains no description of or reference to the rings described and claimed in the specification. This depends upon the 6th section of the 15 & 16 Vict. c. 83, which provides that "every petition for the grant of letters patent for an invention, and the declaration required to accompany such petition, shall be left at the office of the commissioners, and there shall be left therewith a statement in writing, hereinafter called the provisional specification, signed by or on behalf of the applicant for letters patent, *describing the nature of the said invention*." It is not necessary that the provisional specification should point out all the matters of detail which are required in the full specification. It is enough if it agrees with it in the statement of the general nature and object of the invention: and, if there *be* a difference, that is no ground for avoiding the patent. [CROWDER, J.—Must not the pro-

visional specification point out all the material parts of the invention?] It is enough if sufficient be stated to bring all parties interested in the subject before the Attorney-General. And if, in the interval between the filing of the provisional and the complete specification, a more useful or convenient mode of carrying out the invention should present itself to the mind of the inventor, he is bound to specify according to the improved light which subsequent experience has thrown upon the subject. That has been done here. The inventor may, if he pleases, at once file a complete specification: s. 9. The prerogative of the crown as to *the grant of patents is wholly unaffected by the statute. The only provision for the avoidance of the patent is that contained [*285 in the 17th section, viz., for non-payment of stamp-duties at the periods prescribed. There is nothing to make it void because the provisional specification falls short of what it ought to contain, provided there be no fraud,—which is not found or suggested here.

3, 4. The third objection,—that the letters patent were invalid, by reason of a publication during the operations in the Black Sea and the Argus respectively, or one of them, of a material part of the invention claimed,—and the fourth,—that the letters patent were invalid, by reason of the use by the plaintiff prior to the date of the letters patent of the apparatus for which the letters patent were granted, in executing a contract for profit,—present substantially the same question. It is submitted that the use of the invention prior to the grant of the letters patent did not go beyond the fair and legitimate limits of experiment. The experiment at the plaintiff's works at Gateshead is disposed of by the observations of the arbitrator. In order to ascertain the utility and practicability of the invention, it was essential that experiments should be made at sea and in deep water, under the circumstances ordinarily attending the laying a submarine telegraph cable,—with a vessel in motion, and under the action of the winds and waves, and of currents which might operate upon the machinery used for the purpose. The effect of these influences obviously could only be ascertained by the course adopted here. The utility of the invention could not be tested until the arrival of the vessel with the cable on board in the Black Sea. [CROWDER, J.—Was it put into use when the cable was transferred from the Black Sea, the vessel in which it was first placed, to the Argus?] The *transfer from the one vessel to the other was merely the [*286 consequence of an accident: the cable was not "payed out." The rule upon this subject is well stated in the case of In re Adamson's Patent, 6 De Gex, M'N. & G. 420. There, a contractor for certain harbour works had in the progress of his undertaking invented an apparatus which greatly facilitated the works, but which could only be tested in a place accessible to the public. After having used the apparatus for four months in the progress of the works, he applied for a patent: and it was held that such user amounted to a dedication to the public, and that he was not entitled to a patent. The Lord Chancellor (Cranworth) says: "The petitioner admits that he completed his invention in May, 1855, and that he used it publicly for upwards of four months before applying for the patent. *No doubt, an experiment might have been made; and, if made bonâ fide only for the purpose of testing the merits of an invention, I do not think it would have amounted to a dedication to the public:* but where, as in the present case, thousands

of persons had the opportunity of seeing the apparatus at work for a period of four months, during the carrying on of the petitioner's contract, and in the regular course of the undertaking, it is quite clear that no intention of applying for a patent originally existed; and, under such circumstances, and after the lapse of such a time, I must hold that there was a dedication to the public, and refuse the application." [CROWDER, J.—*This* invention was used in the carrying out of a contract.] But the contract had no reference to the invention. [CROWDER, J.—Nor had it in the case cited.] In order to test the utility of the invention, it was necessary that an experiment upon a large scale should be made. The arbitrator has found that there was no possibility of making *287] a complete experiment on shore: and it is obvious that no *satisfactory experiment could be made even at sea, except in the performance of some contract. The laying down the cable in the Black Sea was not a public use of the invention within the meaning of the statute and the letters patent: Morgan *v.* Seward, 2 M. & W. 544, 559.† [CROWDER, J.—Does the arbitrator find here that what was done in the Black Sea was done merely for the purpose of experiment?] He does not in terms find so; but that is the whole tendency of his finding: it is evident that in his judgment there was no publication.

Cleasby, contrà.—The inventor by his specification claims three things,—"first, coiling the wire or cable round a cone,"—secondly, "the supports placed cylindrically outside the coil round the cone,"—thirdly, "*the use of rings in combination with the cone as described.*" 1. In the first place, there has been no infringement. The claim distinctly points to a "cone" as an essential part of the invention. Any workman, looking at the specification, could not fail to understand from it that the material part of the plaintiff's invention is the cone: and if so, the use of a "cylinder" could be no infringement.

2. There is a fatal difference between the provisional and the complete specification. The 6th section of the 15 & 16 Vict. c. 83, requires the provisional specification to describe "the nature of the invention." That necessarily means the *whole* invention. The manner in which it is to be carried into effect (and the best manner known to the inventor) is to be disclosed by the complete specification. But both must describe *the invention* accurately and completely. Nothing can be described as "the invention," in the complete specification, which has not already been described in the provisional specification. The inventor may in *288] the *complete specification give additional information as to the manner of carrying it out; but he has no right to add a scintilla to the invention contained in the provisional specification. The 3d section of the act empowers the commissioners of patents to frame rules and regulations respecting the business of their office. One of the rules made in 1852, in pursuance of that authority, is as follows:—"The provisional specification must state distinctly and intelligibly the whole nature of the invention, so that the law officer may be apprised of the improvement, *and of the means by which it is to be carried into effect:*" see Norman on Patents, p. 240. Here, the provisional specification confines itself to the cone, altogether omitting all mention of the "rings," which appear to form a most material part of the alleged improvement. [WILLES, J.—A form of letters patent is given in the schedule to the act. It recites the complete specification, if a complete

specification has been filed under s. 9, or, if no complete specification has been filed, it makes it a condition that that shall be done: but, in either case, there is no reference in the letters patent to the provisional specification, which seems to be a mere matter for the information of the law officer, and does not, as it seems, at all affect the validity of the patent. Unless you can make out that the provisional specification is conclusive as to what the invention is, there is nothing in this point.] It is not suggested that a mistake in describing the mode of carrying the invention into effect in the provisional specification, would affect the validity of the patent: but that the nature of the invention must be completely described.(*a*) In Croll *v.* Edge, 4 C. B. 479 (E. C. L. R. vol. 56), *a patent was held void by reason of a variance between the invention specified and that described in the title. In Hancock *v.* Noyes, 9 Exch. 388,† there is a pretty strong intimation of opinion on the part of the court that a patent would be held void under a plea of non concessit, where the specification embraces something beyond the invention for which the patent was granted. In Onions *v.* Crowley, 1 Macrory's Patent Cases 261, the plaintiff had taken out a patent for "improvements in the manufacture of certain parts of machinery used in spinning." The "deposit paper" lodged with the Attorney-General (for which the "provisional specification" is now substituted, and which was required to contain "an outline description of the invention"), began by describing the invention thus:—"This invention relates to certain parts of machinery used in spinning, which parts are known by the names of spindles and flyers. My improvements consist in casting such spindles and flyers from suitable moulds, instead of the mode now used for manufacturing such spindles and flyers, which present mode consists in making them all of iron forged and wrought:" and it concluded thus:—"I do not confine myself to the shape or size of flyer, but what I claim is the producing flyers of any shape and size by casting, after the principle above described." The specification described the invention thus:—"My invention has for its object the improvement of the manufacture of those parts of spinning machinery called flyers and pressers, and consists of *combining the processes of casting and annealing in making such articles*, in place of the means heretofore employed:" and it concluded,—"I would have it understood that what I claim is, the manufacture of flyers and pressers for spinning machinery, by casting them as herein described, and then causing them to be annealed." It was left to the jury as a question of fact, *whether the specification described the invention for which the patent was taken out: and the jury found that it did not. [*289 [*290

3, 4. There was such a prior publication and user for profit of the invention in question as to invalidate the subsequent patent. The arbitrator finds that, in December, 1854, the plaintiff entered into a contract with government to lay down an electric telegraph communication between Varna and Balaklava, and Balaklava and Eupatoria. In the course of carrying that contract into effect, the invention was used; and thus it became public property. It may be that the experiments at the plaintiff's works at Gateshead did not amount to a publication: but

(*a*) See upon this subject the evidence given by Mr. Carpmael and by the Master of the Rolls (Sir John Romilly) and the Solicitor-General (Sir W. Page Wood) before a committee of the House of Lords, in 1851. Report, pp. 60, 379.

what was done on board the Argus clearly did. It is said that this latter was a mere "experiment." No doubt, the plaintiff availed himself of the experience he obtained in the course of performing his contract with government to perfect his invention. But, in that sense, Stephenson, while constructing the great tubular bridge, might be said to have been engaged in an experiment. [CROWDER, J.—That would be a very different case from this. The contract there would be for the construction of the bridge itself. Here, the contract entered into by the plaintiff was, to lay down the telegraph cable; the manner of doing it being left to his discretion and judgment.] Nihil simul inventum est et perfectum. At what period may the inventor of a thing be supposed to cease to make experiments? Was one voyage to satisfy the plaintiff as to the operation and effect of his improved method? or was he to go on making voyage after voyage? If he is allowed to make one profitable use of his discovery before obtaining a patent for it, why not more? In Adamson's Case, 6 De Gex, M'N. & G. 420, there was but one user of the invention for profit, and yet that was held to be such a public use
*291] *of it as to avoid the patent. It is true that that was done under circumstances and conditions of greater publicity than could happen in this case; but the court cannot enter into nice considerations of the greater or less degree of publicity attending the user. The cases show that any user prior to the grant of the patent, whereby a knowledge of the invention is imparted to the public, avoids the grant: Wood *v.* Zimmer, Holt's N. P. C. 58 (E. C. L. R. vol. 3); Losh *v.* Hague, 1 Webster P. C. 202, Hindmarch 95; Carpenter *v.* Smith, 9 M. & W. 300,† 1 Webster P. C. 530, 534; Mullins *v.* Hart, 3 Car. & K. 297 (E. C. L. R. vol. 14). In Morgan *v.* Seaward, 2 M. & W. 554,† there was no user in the carrying into effect any contract: the invention was not used at all for any beneficial purpose: nor was it a thing that was capable of being used by itself. The arbitrator in stating this case has guardedly omitted to state that what was done on board the Argus in the Black Sea was a mere experiment. It is plain that, at the time the plaintiff put the cone on board that vessel, he had not made up his mind to apply for a patent: but that he afterwards did so in pursuance of an intention to take out a patent, if he found it desirable.

M. Smith, in reply.—1. The infringement seems to be conceded. 2. The provisional specification sufficiently describes "the nature of the invention:" it was not necessary that it should go on to describe the mode of carrying it into effect; that being the office of the complete specification. And there is no substantial variance here between the two instruments. The use of the rings was a mere mode of carrying the invention into effect,—for managing the apparatus in drawing the cable off the cone. But, supposing there was a variance, it would not, in the absence of fraud, avoid the patent: Cook *v.* Pearce, 8 Q. B. 1044
*292] (E. C. L. R. vol. 55). 3, 4. The *arbitrator expressly finds that the experiments at the works at Gateshead were incomplete and unsatisfactory. Indeed it is manifest that no experiment, except upon a scale which would be impracticable unless conducted as this was, would have sufficed to enable the inventor to judge of the utility of his invention. The circumstance of the experiment having been tried in the performance of a contract which, if successful, would produce profit, does not make it the less an experiment. Besides, the contract with

government was, for making and laying down the cable, not for the apparatus whereby the operation of laying it down was to be performed. In Bentley *v.* Fleming, 1 Car. & K. 587 (E. C. L. R. vol. 12), it was held, by Cresswell, J., that, if the inventor of a machine lend it to another, in order to have its qualities tested, and that other use it for some weeks in a public room, this is not giving the invention such publicity as to deprive the inventor of his right to obtain letters patent for it. [CROWDER, J.—That case was moved in the court in banc, but upon another point: which so far strengthens its authority: 1 C. B. 479 (E. C. L. R. vol. 50).] In Coryton on Patents, p. 93, it is said "The question of 'user' is almost entirely one of fact, to be dealt with according to the circumstances of each particular case. In Hartley *v.* Howland, London Journal, 1852, the latitude given to the patentee was very great. The manufacture was glass, and the publication contended for the open use of the plaintiff's invention by the predecessor of the defendant during the period of three months (March to May, 1835), in a factory employing seventy men. The question put to the jury by the learned Chief Baron, was whether that constituted a sufficient publication to the trade and the world to deprive the plaintiff of the right to take out a patent. The jury found a verdict for the plaintiff." *If the question be one of fact, it is here disposed of by the finding of the arbitrator. [*293

Cur. adv. vult.

BYLES, J., now delivered the judgment of the court:—

The first objection of the defendants was, that the defendants' apparatus is not an infringement of the plaintiff's invention.

It was for the arbitrator to decide any question of fact; and the court, therefore, are not at liberty to interfere with his finding, unless they see that there was no evidence of infringement before him. But the substitution by the defendants of a cylinder having a domed or hemispherical top, for the cone or the cone with the conoidal apex in the plaintiff's apparatus,—both the plaintiff's and the defendants' apparatus being used for the same purpose and in nearly the same manner,—is, in our judgment, not only evidence, but strong evidence, to support the arbitrator's finding.

The second objection was, that the provisional specification contained no mention of the rings claimed in the full specification.

But the office of the provisional specification is only to describe generally and fairly the *nature* of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out: otherwise the provisional specification must be as full as the complete specification, and drawn with as much care and deliberation. Indeed, the statute itself indicates this distinction between the provisional and the final specification; for, it calls the latter the *complete* specification,—implying that the former is, or may legally be, in some respects executory and incomplete. Moreover, it enacts (s. 6) that the provisional specification is to describe *the nature* of the invention, and no more: but when the statute comes to speak of *the complete specification, its language is altogether different: it enacts (s. 9) that the complete specification shall describe, not only the nature of the invention, but also the manner in which it shall be performed; and not only describe, but particularly ascertain it. We therefore think that the provisional specification in the case under consideration sufficiently [*294

describes the nature of the invention, though it does not enter into a detail of all the means by which it is to be accomplished.

The third objection was, that the plaintiff's invention had been disclosed and published before the date of the letters patent.

But a necessary and unavoidable disclosure to others, such as here appears, if it be only made in the course of mere experiments, is no publication; although the same disclosure, if made in the course of a profitable use of an invention previously ascertained to be useful, would be a publication: In re Adamson, 25 Law Journ. Ch. 457.

The answer to this third objection, therefore, depends on the fourth and last and main objection, which was this,—That the use of the apparatus for profit before the date of the letters patent, was a use which avoided the patent.

It must be and is conceded, on the part of the plaintiff, that an inventor's public use, for profit, of an invention already ascertained by previous experiment to be useful, is a gift of the invention to the public, and avoids a subsequent patent. And it is conceded by the defendant, that a use before the patent, merely experimental and tentative, does not avoid it.

Now, the use here made of the invention in actually laying down the cable, was a use which partook of both characters. On the one hand, it was experimental and tentative; but, on the other, the experiment itself turned out, not only successful, but beneficial to the inventor at the moment.

*295] *The true question, therefore,—looking at the decision of the arbitrator,—seems to be this: is an experiment performed in the presence of others, which not only turns out to be successful, but actually beneficial in the particular instance, necessarily a gift of the invention to the world?

We think it is not. In the case under consideration, experiments on dry land are found to be indecisive. The decisive experiment still remains to be made on a large scale, and in deep water. An opportunity presents itself, in the course of a government contract,—not a contract for the use of this particular apparatus, but a contract for laying down the cable by any means the contractor may select. The experimentor is obliged either to experiment in a way that may turn out to be useful in the particular instance, or else not to make any efficient and decisive experiment at all. The coincidence of an experiment with actual immediate profit or advantage from it, if successful, is unavoidable.

Suppose, even, that this coincidence had been accidental. Suppose that, in the course of the voyage, the inventor had tried some further and new experiment, with an alteration of the apparatus, which alteration had at once answered some useful purpose; surely that further invention would have been his property: otherwise, a man cannot have the property in an invention which starts from his brain so fully matured and armed that it not only succeeds at the first trial, but accomplishes on that very trial some profitable or useful purpose.

If, indeed, the plaintiff in the present case had on other and subsequent voyages used his apparatus, and unnecessarily delayed his application for a patent, he would have given his invention to the public. But here the arbitrator must be taken to have found,—as he well might

on the evidence before him,—that the *inventor lost no time, but applied for his patent with reasonable expedition. [*296

There must, therefore, be judgment for the plaintiff.

Judgment for the plaintiff.

The provisions of our Acts of Congress differ somewhat from the English statutes in respect to the nature of the prior use of an invention which will avoid a patent. The "Statute of Monopolies" (21 James 1) authorizes the grant of patents only for inventions, "which others, at the making of the Letters Patent, &c., shall not use." In the United States, the Act of 1793 (1 Litt. & Brown, Stat. 319) uses the words "not known or used before the application" for the patent, which have been construed to mean "not known to or used by the public:" Pennock *v.* Dialogue, 2 Peters 1; Shaw *v.* Cooper, 7 Id. 292. This Act was supplied by the Act of 1836 (Brightly's U. S. Dig. 726), the language of which in this connection is, "not known or used by others before his (the patentee's) discovery or invention, and not at the time of his application in public use or on sale with his consent or allowance as the inventor or discoverer." A greater latitude was given to inventors by the Act of 3 March, 1839 (Bright. Dig. 728), which provides that no patent shall be held to be invalid by reason of the purchase, sale, or use of any patentable invention or discovery prior to the application for a patent by the inventor, except on proof of abandonment of such invention to the public; or that such purchase, sale, or use has been for more than *two years* prior to such application. This last Act, however, as it would seem, does not affect the previous doctrine in respect to "prior user," except within the period therein mentioned: see Kendall *v.* Winsor, 21 Howard 322; M'Clurg *v.* Kingsland, 1 Id. 202; Potts *v.* Hall, 2 Blatchford 235; Winans *v.* Schenectady, &c., R. R., Id. 291; Sargent *v.* Seagraves, 2 Curtis, C. C. 555.

Under these statutes the law on this subject, as settled by numerous decisions, may be briefly stated as follows:

The object of the patent laws being to secure for the benefit of the public the use of an invention after the temporary monopoly has expired, and to make it as available as possible in the mean time, one who conceals his invention and uses it for his own exclusive profit, on the one hand, or, on the other, permits it without objection to get into general and public use for a considerable period of time, is not entitled afterwards at his pleasure to obtain a patent; for the consideration for the grant of the monopoly has failed. Even where the knowledge of the invention has been surreptitiously obtained, or fraudulently communicated to the public by third persons, the inventor will be debarred if he delays for an unreasonable time to claim and enforce his rights, after he has or might have been cognisant of the fact. His acquiescence under such circumstances is equivalent to an express abandonment; and the absence of any such intention is not, in this respect, material, if the facts are clear. When, however, an inventor, acting in good faith, forbears to apply for a patent until he has perfected his invention, and tested its value, utility, or success, by putting it into practice, though in so doing he may incidentally derive a profit from its use, or though in the course of his experiments for this purpose a knowledge of the invention may be accidentally or surreptitiously obtained by or communicated to the public, provided it be accompanied or followed by a claim of

his inchoate right, the rule is different and the patent will not be affected. The question of intention, in all such cases, is for the jury subject to the rule that the law will not presume either a deliberate abandonment to the public, or even an acquiescence in the use of the invention by others which is not clearly proved. And finally it is settled that it is the prior public use or sale of the *thing* patented, not of the article produced or manufactured thereby, which will operate to avoid the patent: Pennock *v.* Dialogue, 2 Peters 1; Grant *v.* Raymond, 6 Id. 248; Shaw *v.* Cooper, 7 Id. 292; M'Clurg *v.* Kingsland, 1 Howard, U. S. 202; Kendall *v.* Winsor, 21 Id. 322; Morris *v.* Huntington, 1 Paine, C. C. 348; Mellas *v.* Silsbee, 4 Mason, C. C. 108; Ryan *v.* Goodwin, 3 Summer 518; Wyeth *v.* Stone, 1 Story 280; Sargent *v.* Seagrave, 2 Curtis 555; Potts *v.* Hall, 2 Blatchford 235; M'Cormick *v.* Seymour, Id. 256; Winans *v.* Schenectady & Troy R. R., Id. 291. Two recent cases, in which the patents were sustained, will illustrate these distinctions. In Kendall *v.* Winsor, 21 Howard 322, the patent was for a machine for making harness. The patentee had for several years been endeavouring to construct a machine for that purpose, and in 1849 completed four such machines, and made harness on them, which he sold when he could get orders. These machines were subject to certain practical difficulties in their working, in endeavouring to remedy which, as well as to perfect and simplify the invention itself, he was subsequently employed. It was further alleged that he had constantly intended to apply for a patent, when he should have perfected the machine; though on this, as on other points, there was contradictory evidence. The application was made in 1854. In the mean time, he had taken every precaution to keep his invention secret; but one of his workmen fraudulently divulged it to another manufacturer, who employed it in his business shortly before the application for the patent. In an action for an infringement, the Court instructed the jury, *inter alia*, that, "to constitute such an abandonment to the public as would destroy the plaintiff's right to take out a patent, in a case where it did not appear that any sale of the thing patented had been made, and there was no open public exhibition of the machine, the jury must find that he intended to give up and relinquish his right to take letters patent. But if the plaintiff did intend not to take a patent, and manifested that intent by his declarations or conduct, and thereupon it was copied by the defendant, and so went into use, the plaintiff could not afterwards take a valid patent." This instruction was held by the Supreme Court to be correct. So in Winans *v.* Schenectady and Troy Railroad, 2 Blatchford C. C. 291, where the patent was for "Improvements in the construction of cars and carriages intended to run on railroads," and was issued in 1834, it appeared that the patentee had made and used before that time several cars, by way of experiment; and for that purpose, and in order to ascertain the value of his invention, and to discover and remedy any practical defects, had in 1831, and occasionally afterwards, procured his cars to be used on the Baltimore and Ohio Railroad. In an action by the inventor against a company using an alleged infringement, in which the defence of abandonment by prior user was set up, the Court charged on the trial, "that the law allowed to an inventor a reasonable time to perfect his invention, and ascertain its utility, before, in order to secure to himself its exclusive use, it obliged him to take out his patent; that, in applying this rule, it was the duty of the jury to take into consideration the nature of

the invention, and all the circumstances of the case; but that an inventor was bound to act with sincerity and good faith towards the public; so that if he unnecessarily deferred his application for a patent and suffered his invention to be used, excepting for the purposes above mentioned, and beyond what he had reason to believe was necessary for these purposes, his patent would be void." A verdict being rendered for the plaintiff, the Court, on motion for a new trial, held the instructions to be correct, and that the patent was valid.

DALTON *v.* THE SOTUH-EASTERN RAILWAY COMPANY.

May 8.

In an action founded upon Lord Campbell's Act, 9 & 10 Vict. c. 93, for injury resulting from death, legal liability alone is not the test of injury in respect of which damages may be recovered; but the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury; and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned.

Therefore, in an action by a father for injury resulting from the death of his son through the negligence of the servants of a railway company, it appeared that the son, who was twenty-seven years of age, and unmarried, but living away from his parents, had for the last seven or eight years been in the habit of visiting them once a fortnight, and of taking them on those occasions presents of tea, sugar, and other provisions, besides money, amounting in the whole to about 20*l.* a year:—Held, that the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from the continuance of his son's life as to entitle him to recover damages under the statute.

But held, that it was not competent to the jury to award him compensation for the expenses incurred by him for his son's funeral or for family mourning.

THIS was an action brought by the plaintiff, as administrator of his deceased son, to recover damages under Lord Campbell's Act, 9 & 10 Vict. c. 93, by reason of the deceased having been accidentally killed through the negligence of the defendants' servants.

The declaration stated, that, before and at the time of the committing of the grievance thereinafter mentioned, the defendants were common carriers of passengers for reward by trains of carriages by a certain railway, and, before the committing of the grievance thereinafter mentioned, the said intestate, at the request of the defendants, became, and at the time of the committing of the said grievance, at their said request, was, a passenger in a certain train of carriages, to be by the defendants carried, for reward to them in that behalf, by the said train of carriages by and along the said railway from one place to another place; and that, before and at the time of the committing of the said grievance, the defendants were possessed of a *certain other train of carriages, [*297
and were causing the same to proceed along the said railway, and had the management, government, and direction thereof upon the said railway; yet that the defendants, by their servants in that behalf, took so little and such bad care in and about the carrying of the deceased as aforesaid by the first-mentioned train, and in and about the management, government, and direction of the said secondly-mentioned train, that, by reason of the said carelessness and negligence, the said secondly-mentioned train came into violent collision with the first-mentioned train, and greatly crushed and broke the carriages whereof it consisted, and by means thereof the said deceased was killed, leaving him surviving

his father, the plaintiff, and his mother, Sarah Dalton, for whose benefit this action is brought; and, after his death, administration of all and singular the goods, chattels, and credits which were of the deceased at the time of his death, in due form of law was granted by the Right Reverend Father in God, John Bird, by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan: And the plaintiff, as administrator as aforesaid, claimed 600*l.*

The defendants pleaded not guilty; whereupon issue was joined.

The cause was tried before Byles, J., at the sittings in Middlesex after last Hilary Term. The action was brought by the plaintiff, as administrator, under the 9 & 10 Vict. c. 93, to recover damages against the defendants for the loss sustained by himself and his wife through the death of their son, who was accidentally killed whilst a passenger in a train on the South Eastern Railway, which on the 28th of June last, through the negligence of the company's servants, came into collision with another train on the defendants' line between the Blackheath and Lewisham stations.

*298] *It was admitted on the part of the defendants that the death of Thomas Dalton was the consequence of negligence on the part of their servants, and that that negligence was of such a character as would have enabled the deceased himself to recover damages for any injury short of death which might have resulted to him thereby: but it was insisted that the plaintiff and his wife had sustained no such injury by the death of their son as to enable them to maintain an action under the statute.

As to this the facts were these:—The deceased, who was about twenty-seven years of age, and unmarried, resided in London, where he worked as a pianoforte maker, earning about 3*l.* a week. For the last seven or eight years he had been in the habit of visiting his father and mother, labouring people at Dartford, once a fortnight, and on these occasions took them presents of tea, coffee, sugar, meat, &c., which with occasional donations of money averaged about 20*l.* a year.

On the part of the company, it was submitted, that, under this statute, the plaintiff could only recover in respect of the loss of some legal right. On the other hand, it was submitted that it was enough that the plaintiff should have had a reasonable expectation of a continuance of pecuniary advantage from the remaining alive of his son: and, in addition to compensation for that loss, the plaintiff claimed 10*l.* which he had expended upon his son's funeral, and also the cost of providing himself and wife with mourning.

The learned judge told the jury, that, in his opinion, the plaintiff and his wife had sustained such a pecuniary injury from the death of their son as to entitle them to recover damages under the statute: and he directed them to find separately the sums they thought the plaintiff entitled to in respect of the mourning and the funeral expenses.

*299] *The jury accordingly returned a verdict for the plaintiff,—assessing the damages as follows:—80*l.* for the plaintiff, and 40*l.* for his wife, in respect of the pecuniary loss sustained by their son's death; 10*l.* for the funeral; and 15*l.* for mourning: and leave was reserved to the defendants to move to enter a nonsuit, if the court should be of opinion that there was no evidence of such damage as would entitle the plaintiff to maintain an action under the statute, or to

reduce the damages by deducting the sums allowed for funeral expenses and mourning.

Hugh Hill, Q. C., having on a former day in this term obtained a rule nisi,

Montagu Chambers and *Needham* showed cause.—The first question is whether the plaintiff has sustained such an injury from the death of his son as to entitle him to maintain the action. Now, the act is intituled "An act for compensating the families of persons killed by accidents." The first section enacts, "that, whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." And the 2d section enacts "that every such action shall be for the benefit of the wife, husband, parent (which by the interpretation clause, s. 5, includes father and mother, and grandfather and grandmother, and stepfather and stepmother), and child of the *person whose death shall have been so caused, and shall be [*300 brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought." Can it be said that "injury" did not result to the parents of this young man from his death? He was not residing with them, it is true; but he was constantly visiting them, and materially contributing to their support. [CROWDER, J.—It will be said on the other side that many circumstances might have occurred to induce the son to discontinue these contributions.] The court will rather contemplate the continued performance of a duty dictated alike by nature, morality, and religion. The damage can only be measured by the state of facts at the time, and the probability of their continuance. It has already been decided in many cases that compensation may be awarded for wounded feelings in addition to pecuniary damage. [BYLES, J.—Except as to the 10*l.* and 15*l.*, this point hardly arises. There is no complaint of the direction. The law casts upon a son a legal obligation to maintain his parents. The plaintiff therefore has clearly sustained some damage by his son's death; and the quantum is not in question.] The 7th section of the 43 Eliz. c. 2 enacts that "the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner and according to that rate as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions, shall be assessed; upon pain that *every one of them [*301 shall forfeit 20*s.* for every month which they shall fail therein." Incidentally, it is true, that is in aid of the parish; yet it is a duty which is distinctly fixed upon the parent or child. If the compensation under this statute were to be limited by the strict legal rights and

liabilities of the parties, a very small class of persons indeed would be benefited by it. Take the case of a man having a son at college, or studying for a profession, to whom an allowance is made suitable to his station,—could it be said, that, because the father was under no legal obligation to continue the allowance, the son would sustain no pecuniary loss by his death? It is enough if he is deprived of those just expectations of pecuniary aid which but for the death he would have a right to entertain. In the case of an action for the seduction of a daughter, the legal foundation of the action is the service of the daughter: but it never was suggested that the father could not recover damages because the daughter was under no legal liability to render service. The case of Waters *v.* Towers, 8 Exch. 401,† strongly supports this argument. That was an action for a breach of contract in not fitting certain mill-gearing in a workmanlike manner, and for not completing it within a reasonable time; the declaration alleging for special damage that the plaintiffs lost the benefit of a certain contract. It appeared, that, in consequence of the defendants' breach of their contract, the plaintiffs, who carried on the business of bobbin-spinners in Cumberland, were unable to fulfil a (verbal) contract which they had made with two of the members of their firm, who carried on a separate business in Manchester, for the supply of goods as alleged in the declaration. On behalf of the defendants, it was submitted that the loss of profit upon that transaction was too remote a consequence to be the subject of special damage; and that, *302] even if that *were not so, still the plaintiffs could not recover any damages in respect of it, by reason of the community of the parties, and also that the contract was invalid by the 17th section of the statute of frauds, 29 Car. 2, c. 3, the value of the goods agreed to be supplied being above 10*l.* A verdict was taken for the plaintiffs for 14*l.*, with leave to move to increase it by 113*l.*, the estimated profit which would have accrued to the plaintiffs, if their contract for the supply of the bobbins had been fulfilled. Upon cause being shown against a rule obtained for that purpose, it was submitted that the contract was not binding on the parties, inasmuch as no action at law could be maintained by the three plaintiffs against two of themselves, and also because the contract was void by the statute of frauds. But Alderson, B., said: "If a person undertakes to make a certain article for another, and to deliver it to him on a particular day, but fails to do so until a year afterwards, it would be most unreasonable that the latter should not recover any damage because the contract was not in writing. The existence of a contract is evidence of the probable amount of loss sustained. Suppose the plaintiffs had said, 'We should have made such and such a contract, if the defendants had performed theirs,' and the jury believed that the plaintiffs would have done so, that would surely have been evidence of the amount of loss occasioned by the defendants' breach of contract." And the rule was made absolute. [*Aspland*, Amicus Curiæ, mentioned a case of Bramall *v.* Lees, tried before Crompton, J., at Liverpool, at the Spring Assizes, in 1857, where the father of a child twelve years of age recovered a verdict for 15*l.* against a druggist, who had sent laudanum instead of tincture of rhubarb, and so caused the child's death; it appearing that the child was at the time incapable of *303] earning anything towards its support, it was insisted on the *part of the defendant that the parents sustained no pecuniary injury

from its death, and a rule nisi was granted to set aside the verdict, but, being discouraged by the court, it was ultimately allowed to drop.(*a*) Then, as to the funeral expenses and mourning,—it was incumbent on the plaintiff to bury his son decently, and reasonable to put on mourning for his loss. These expenses, therefore, as much constituted a consequential damage as if the son had sustained an injury short of death, and the plaintiff had carried him home and incurred expense in medical and other attendance upon him. [BYLES, J.—It may be said on the other side that the duty of burying the body properly devolved upon the parish officers, under the 7 & 8 Vict. c. 101, s. 31.]

Peterdorf, in support of the rule.—This case presents a question of no ordinary difficulty. Since the passing of the statute, no intelligible rule has been laid down for the computation of damages: and it remains for this court,—or for the Court of Exchequer in a similar case now pending before it, of Franklin *v.* The South Eastern Railway Company, arising out of the same accident,—to say what is the legitimate interpretation of the act. Is the test for the measure of damages to be the calculable or ascertainable pecuniary loss which the survivor has sustained, as was suggested by Pollock, C. B., in Gillard *v.* The Lancashire and Yorkshire Railway Company, 12 Law Times 356? Or is the test to be the hope or expectation of benefit from the continuance of the life of the deceased? If the former is to prevail, this rule must be made absolute. If the latter, see the incalculable number of degrees of which that expectation may consist,—from almost *absolute certainty to the extreme of doubt. [CROWDER, J.—Why would [*304 not reasonable expectation do,—that which a reasonable man might fairly expect?] Who is to say what is reasonable expectation here? [CROWDER, J.—The jury, perhaps.] In Blake *v.* The Midland Railway Company, 18 Q. B. 93 (E. C. L. R. vol. 83), it was held, that, in an action under this statute, by the wife, husband, parent, or child, of a person killed by misfeasance, the jury, in estimating the damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only. Coleridge, J., at the conclusion of the judgment in that case, says: "We are of opinion that the learned judge at the trial ought more explicitly to have told the jury, that, in assessing the damages, they could not take into their consideration the mental sufferings of the plaintiff for the loss of her husband; and that, as the damages certainly exceeded any loss sustained by her admitting of a pecuniary estimate, they must be considered excessive." [BYLES, J.—To entitle you to succeed on the first part of your rule, you must show that the plaintiff was entitled to no damages at all.] The question is, has the plaintiff, through the act of the defendants' servants, sustained any calculable pecuniary loss? [CROWDER, J.—Can any reasonable being doubt that this plaintiff had a pecuniary interest in his son's life? For seven or eight years he had been in the regular habit of contributing to the support of his parents. It is true he might not always be of ability to continue this: but the same uncertainty exists in all cases where the loss is of an income arising from personal exertions.] There is little or no analogy between earnings and accidental or occasional gifts like these. The statute contemplates a "recompense" for the loss

(*a*) See 29 Law Times 82, 111, 166.

of profit arising from some legal obligation. The relation of parent and child is not necessary to create *the mere moral obligation to *305] administer to the wants of the aged and destitute. The true rule, it is submitted, is this,—where the son is not emancipated from his parent's roof, and he by his industry contributes to his parent's support, to the extent of the pecuniary value of that contribution the parent would be entitled to compensation: but, where the son *is* emancipated, the circumstance of his having been in the habit of assisting his parent out of the proceeds of his labour, will not afford the latter a ground of action in respect of the discontinuance of these voluntary contributions. Suppose the son had happened to be out of employ at the time of the accident, would that circumstance have affected the measure of compensation? All these considerations show the difficulty and the danger in dealing with this statutory right to compensation for a pecuniary loss. As to the funeral expenses,—these clearly are not within the act. The duty of a parent to bury his child, or of a child to bury his parent, if of ability, stands upon a totally different footing, and is altogether independent of accident. Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

The great question in this case is disposed of by the judgment of the court of Exchequer in Franklin *v.* The South Eastern Railway Company, 3 Hurlst. & N. 211,† by which it is decided, with our entire concurrence, that legal liability alone is not the test of injury in respect of which damages may be recovered under Lord Campbell's Act, 9 & 10 Vict. c. 93; but that the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury, and damages may be given in respect of *that expectation being dis- *306] appointed, and the probable pecuniary loss thereby occasioned.(*a*)

In respect, therefore, of the sum of 120*l.*, given as damages upon that footing, the verdict must stand.

As to the expenses of the funeral and mourning, however, we think they ought not to be allowed. The subject-matter of the statute, is, compensation for injury by reason of the relative not being alive: and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral, or in putting on mourning for his loss.

The rule must, therefore, be absolute to reduce the verdict by those expenses, and discharged as to the residue. Rule accordingly.

(*a*) Pollock, C. B., in giving the judgment of the court in that case, says: "The statute does not in terms say on what principle the action it gives is to be maintainable, nor on what principle the damages are to be assessed: and the only way to ascertain what it *does* is to show what it *does not* mean. Now, it is clear that damage must be shown, for, the jury are to 'give such damages as they think proportioned to the injury.' It has been held that these damages are not to be given as a solatium, but are to be given in reference to a pecuniary loss. That was so decided for the first time in banc in Blake *v.* The Midland Railway Company, 18 Q. B. 93 (E. C. L. R. vol. 83). It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for, they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants had the deceased lived, and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life."

*JOHN THOMAS METCALFE and GEORGE METCALFE v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. *April* 28.

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In an action against a common carrier for the loss of a parcel, a replication that the loss arose from the felonious acts of the defendants' servants is a good answer to a plea founded upon the carriers' act, 11 G. 4 & 1 W. 4, c. 68, s. 1, that the value exceeded 10*l.*, and was not declared at the time of delivery to the carrier.

In an action against a railway company, as common carriers, for the loss of goods, the defendants pleaded a plea founded upon the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, s. 1, that the value of the goods exceeded 10*l.*, and was not declared at the time of the delivery to them; to which plea the plaintiffs replied that the loss arose from the felonious acts of servants of the company.

It was proved that the goods in respect of which the action was brought consisted of articles of jewelry, &c., contained in a tin box, which was enclosed in a deal box fastened with a padlock; that the box was brought to the company's station at Worthing, by a servant of a person in whose house the plaintiffs had lodged, to be forwarded to the plaintiffs in London; and that, when the box was delivered to the plaintiffs there by a porter of the company, it was found that the outer box had been opened, and the tin box and its contents abstracted from it:—Held, no evidence for the jury of a felony by the company's servants.

A box containing goods, some of which were the property of A., and some the property of B. was delivered on their behalf by a third person at a railway station, to be carried from Worthing to London. The box was addressed to A., and was received by him in London, and he paid the carriage:—Held, that there was evidence of a joint bailment in respect of which a joint action might be brought by A. and B. for the loss of the goods.

THE declaration stated that the defendants were, and still are, common carriers by railway for hire, and the plaintiffs, at the request of the defendants, caused to be delivered to the defendants, and the defendants then accepted and received of the plaintiffs, a certain box, and divers goods, to wit, one box, two watches, one snuff-box, one purse, one sovereign, one ring, one pencil-case, four shirt-studs, one pin, two shirt-cufflings, of and belonging to the plaintiffs, therein contained, to be safely and securely carried and conveyed by the defendants, as such carriers for hire as aforesaid, from a place called Worthing, upon the said railway of the defendants, to a certain other place, to wit, London, and there safely to be delivered to the plaintiffs for a certain reward to be paid by the plaintiffs to the defendants in that behalf; yet the defendants did not nor would safely and securely convey or deliver the said box and the said goods as aforesaid, but, on the contrary, so carelessly and negligently behaved and conducted themselves in the premises, that, by and through the carelessness, negligence, default, and improper conduct of the defendants, and not otherwise, the said goods became and were, and still are, wholly lost to the plaintiffs: Claim, 100*l.*

The defendants pleaded,—first, not guilty,—secondly, that the plaintiffs did not cause to be delivered to the defendants, nor did the defendants accept or receive of the plaintiffs, the said box, or the said goods, or any of them, upon the terms or for the purposes in the declaration in that behalf alleged,—thirdly, that the goods *in the declaration [*308
mentioned were contained in one outside package or parcel, that is to say, the said first-mentioned box, and, irrespective of the value of the box secondly mentioned and the said purse, exceeded in value the sum of 10*l.*, and were all of them, except the said purse and box secondly mentioned, articles and property of sorts and descriptions mentioned in the 1st section of a certain statute made and passed in the session of parliament holden in the eleventh year of the reign of King George the

Fourth and the first year of the reign of King William the Fourth [11 G. 4 & 1 W. 4, c. 68], commonly called "The Carriers' Act," and within the intent and meaning thereof, and intended to be protected thereby,—which said first-mentioned box, so being the outside package or parcel in which the said goods were contained, and accessory thereto, was delivered, with the said goods therein, by the plaintiffs to the defendants as common carriers, to be carried by them, to wit, for hire, to the place in the declaration mentioned; that the said box secondly mentioned, and the said purse, were envelopes and enclosures in which respectively certain parcel of the residue of the said goods were contained, and accessory thereto; that, before and at the time when the said first-mentioned box, and the said goods, were so delivered as aforesaid, the defendants had caused to be, and there was, affixed, in legible characters, in a public and conspicuous part of a certain office of the defendants for the receipt of packages and goods to be carried by them as such common carriers as aforesaid, a notice under and according to the true intent and meaning of the said statute, whereby they the defendants notified that a certain rate of charge therein mentioned was required to be paid to them, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe
*309] *conveyance of articles of the several kinds and descriptions in the 1st section of the said act mentioned; and that, at the time of the delivery of the said package or parcel, to wit, the said first-mentioned box and the said goods to the defendants as aforesaid, the value and nature thereof, to wit, of the said goods so exceeding such value as aforesaid, were not declared by the person delivering the same, or any one, and neither the said increased charge was then or at any time paid or offered, nor was any engagement to pay the same accepted by the defendants or the person receiving the said first-mentioned box and the said goods, or any other person whatever.

The plaintiffs joined and took issue upon the above pleas; and, for a second replication to the third plea, said that the loss and injury in the declaration, and every part thereof, arose from the felonious acts of servants of the defendants then being in their employ, and not otherwise.

The defendants took and joined issue on the plaintiffs' second replication.

They also demurred to the second replication, on the ground "that the defendants, under the circumstances stated, were not liable for the felonious acts of their servants."

Spinks, in support of the demurrer.—There is nothing in the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, to render a common carrier liable for the felony of his servants: to constitute an answer to the third plea in this case, therefore, the replication should have alleged,—as did the new assignment in Butt *v.* The Great Western Railway Company, 11 C. B. 140 (E. C. L. R. vol. 73),—that the felony occurred through the gross negligence of the defendants. [WILLES, J.—That case has been very much misunderstood. It was not, as is assumed in some of the text-
*310] books, a *case under the statute at all. It was twice argued. On the first occasion, the replication being like this, I demurred on the ground that carriers are not answerable at common law for the felonious acts of their servants. The plaintiffs then amended by new

assigning, alleging that the article was feloniously stolen by certain servants of the defendants whose names were unknown to the plaintiffs, —" whereby the same was not safely and securely carried, but became and was wholly lost to the plaintiffs, as in the declaration mentioned." The defendants again demurred, and, upon the argument, the court suggested (and the plaintiffs adopted) a further amendment, by replying a loss by felony, *and* that such felony arose through the gross negligence of the defendants. It was there assumed on all hands that felony did not excuse *gross negligence*. CROWDER, J.—Butt *v.* The Great Western Railway Company is explained in a subsequent case of The Great Northern Railway Company, app., Rimell, resp. 18 C. B. 575 (E. C. L. R. vol. 83). Jervis, C. J., there said: "I think the judge has altogether misconceived the decision of this court in the case of Butt *v.* The Great Western Railway Company, because, when the defendants set up a defence under the statute, negligence has nothing to do with the question. The rule is this,—under the statute, felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has nothing to do with it; and, on the other hand, under the carriers' notice, negligence is the sole question, felony is immaterial. Under the statute, felony is an answer; under the notice, negligence. That is the effect of Butt *v.* The Great Western Railway Company, which was a case of felony permitted or occasioned by the negligence of the defendants." And my brother Willes added,—"I am glad the Lord Chief Justice has explained the case of Butt *v.* The Great Western Railway Company; for, in *some modern text-books,(*a*) it is cited as a case upon the statute, which in truth it has nothing whatever to do with." [*311 Those dicta conflict with the decision of the Court of Queen's Bench in the case of Hinton *v.* Dibbin, 2 Q. B. 646 (E. C. L. R. vol. 42), 2 Gale & D. 36. [WILLES, J.—Not at all.]

Raymond, contrà, was not called upon.

CROWDER, J.—The plea is answered by the replication, and consequently the plaintiffs are entitled to judgment.

WILLES, J., and BYLES, J., concurring,

Judgment for the plaintiffs.

May 24. The issues of fact came on to be tried before Byles, J., at the sittings in London in Trinity Term, 1858. The facts that appeared in evidence were as follows:—The plaintiffs are brothers, and were both acting as agents of a Mr. Hollingham of Worthing in the sale of an article used for agricultural purposes, called English guano. They both lodged at Mr. Hollingham's house in Augusta Place, Worthing. On the 17th of August, 1857, they left that place for the purpose of proceeding to London by the 2.40 p. m. train, accompanied by a man named Oliver, a servant of Mr. Hollingham, *who carried their carpet-bags. On their arrival at the station, it was discovered that a deal box [*312 which they had intended to take to London with them had been left behind, and accordingly they sent Oliver back to Augusta Place for it, with instructions to forward it to The Queen's Head Inn, Borough, by

(*a*) See Chitty and Temple on Carriers, 55, 140; Chitty on Contracts, 6th edit. (by Russell) 437; Addison on Contracts, 4th edit. 515; Smith's Mercantile Law, 5th edit. (by Dowdeswell) 286, 288(*i*); 1 Smith's Leading Cases, 4th edit. 176.

the next train. On his return to Augusta Place, Oliver received the box from Mr. Hollingham, with a direction on it to "J. T. Metcalfe, Queen's Head, Borough," and delivered it to a porter at the station at Worthing, in time for the 4.20 train. The box when delivered to Oliver was secured by a padlock, and had in it, amongst other things, the articles enumerated in the declaration, enclosed in a tin box, *some of the articles being the property of each of the brothers.* On the morning of the 18th of August, between 9 and 10 o'clock, the box was delivered at the Queen's Head by a porter belonging to the company, to whom a receipt was given for it by John Thomas Metcalfe, who paid for the carriage. The box was immediately carried up stairs to a bed-room, and opened by George Metcalfe, when it was found that the tin box and its contents had been abstracted. These facts were proved by the plaintiffs, Mr. Hollingham, and the man Oliver.

On the part of the plaintiffs it was insisted that there was ample evidence to prove the allegation in the replication that the loss arose from the felonious acts of servants of the defendants; or, at all events, there was enough to call upon the defendants for explanation.

For the defendants it was submitted, that there was no evidence to go to the jury of any felony by a servant of the company, and that there was no evidence of any joint bailment.

The learned judge directed a verdict to be entered for the plaintiffs upon the first and second issues, and *for the defendant upon the third plea and the replication thereto,—reserving leave to the plaintiffs to move to enter a verdict for 30*l.* if the court should be of opinion that there was any evidence to support the replication which ought to have been submitted to the jury; and also leave to amend by striking out the name of one plaintiff, if necessary,—and reserving leave to the defendants to move to enter the verdict for them on the second issue, if the court should be of opinion that there was no evidence of a joint bailment by the two.

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Lush, Q. C. (with whom was *Raymond*), for the plaintiffs, now moved, pursuant to the leave so reserved to him, to enter the verdict for them.—There was abundant evidence (unanswered, as it was, by any evidence on the part of the defendants) to justify the jury in coming to the conclusion that the tin box and its contents had been abstracted from the outer deal box by some person in the company's employ whilst it remained in their custody. [WILLIAMS, J., referred to The Great Northern Railway Company, app., Rimell, resp., 18 C. B. 575 (E. C. L. R. vol. 86).] There is a wide distinction between that case and the present: there was no evidence there of a felony having been committed at all,—nothing but the mere absence of delivery of the parcel at its destination. Here, it was proved that the box was delivered to the company at Worthing locked, and that it was delivered by them locked at the place to which it was directed in London. [COCKBURN, C. J.—It would be rather strong to presume merely from that, that a felony had been committed by a servant of the company.] It was surely enough to call upon the company to give some evidence in explanation. This is not a loss which could have occurred by *negligence.* [BYLES, J.—The box might have been exposed by negligence on the part of the defendants.] It was enough *for the plaintiffs to trace the box and its contents to the custody of the company. It is impossible in such

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a case to prove more. [WILLIAMS, J.—We all know very well that there is danger of other persons besides the company's servants gaining access to parcels of value. BYLES, J.—You begin by showing that the box is carried for you by the servant of a third person from Augusta Place to the railway station at Worthing.] There is no suggestion that the tin box and its contents were not in the other box at the time of its delivery at the Worthing station. [COCKBURN, C. J.—The statute was intended for the protection of the carrier in respect of valuable articles, which require more than ordinary care. That protection will be entirely withdrawn if felony is to be assumed without some reasonable foundation for it. It is incumbent on the plaintiff to prove, not the possibility, but the *fact* of a felony having been committed by a servant of the company.] It would be absolutely impossible to bring a charge of felony home to any one of the company's servants. [WILLIAMS, J.—That only shows that it is a difficult thing to prove the exception which you rely on.] The evidence shows that a felony had been committed whilst the box was in the possession of the company: and there is no evidence that any person other than the servants of the company had an opportunity of getting at it. To hold that that is not evidence enough to call upon the company for an answer, will virtually operate as a repeal of the statute.

COCKBURN, C. J., being a shareholder in the company, declined to take any part in the judgment.

WILLIAMS, J.—I am of opinion that there ought to be no rule. I am ready to concede that this case does differ from that of The Great Northern Railway *Company, app., Rimell, resp., 18 C. B. 575 [*315 E. C. L. R. vol. 86),(*a*) inasmuch as here there was evidence from which the jury might conclude that a felony had been committed by somebody. But the plaintiffs are not entitled to recover unless they show affirmatively that the goods in question were lost by means of a felony committed by *one of the company's servants*. It is a general rule of law that every man is presumed to be innocent until proved to be guilty: and the servants of a railway company are not to be excluded from the benefit of that rule. Now, it is impossible to say that there was any evidence that the box in question was feloniously abstracted by one of the company's servants. If such a question were to be left to the jury, upon what is called a scintilla of evidence, whether or not the loss had occurred through the felony of a servant of the company, we all know too well the tendency of juries to find against railway companies, to doubt what would be the result. But, to hold such evidence as this to be enough would be altogether to deprive the company, as carriers, of the protection which the legislature has thought fit to throw around them in certain cases.

WILLES, J.—I am of the same opinion. All that the evidence here shows, is, that the box was given into the custody of a servant of the

(*a*) In that case, a parcel was delivered to a porter of the railway company at the station, to be forwarded from Gloucester to London, after the way-bill and the guard's parcel-book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the luggage-van, and entered by him on the way-bill; but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate stoppages, the train reached London, when the parcel was missed:—Held, no evidence for the jury of the parcel having been stolen by a servant of the company.

*316] company at Worthing, *and that they were employed to carry it, without any notice of the nature and value of its contents; and that, when it reached its destination in London, it was found that a portion of its contents had been abstracted. That might have been done either by one of the servants of the company or by some other person. In order to make out a greater degree of likelihood that the act was committed by a servant of the company than by any one else, the plaintiffs might have shown a primâ facie case had the defendants only been carriers of goods, or if it had appeared that the box could not have been exposed so that other persons coming to the railway might have had access to it. Everybody knows that that is not so. The servants of the company, probably too few in number, may have been obliged for a time to leave the box in the office, or in the van with the door open, when strangers might be about, ready to take advantage of the opportunity. To complete the circumstantial evidence here, there is wanting some fact which is more consistent with a loss by felony of a servant of the company than with any reasonable view of the case to the contrary. I think there was no evidence here upon which the jury ought to act, or upon which any reasonable being could act, in arriving at the conclusion contended for on the part of the plaintiffs.

BYLES, J.—The facts of this case are in some respects stronger, and in some weaker, than were those in The Great Northern Railway Company, app., Rimell, resp. There was no proof that the box was safe at the Worthing station, or when it was placed in the van, or that it was placed in the van at all, or that the van was locked: nor was there any evidence as to what became of it on unloading in London, or when it was deposited at the terminus in London, or as to the mode of *317] *conveying it to the hotel where the plaintiffs were staying, except that one of the company's porters brought it there. There was nothing to exclude the supposition that the tin box might have been abstracted by some one else, so as to fix it upon a servant of the company. In The Great Northern Railway Company, app., Rimell, resp., it was proved that the parcel was placed by the porter in the usual receptacle, a locked box in the van; and yet Jervis, C. J., says,—"I think the judge was wrong in leaving the first question" (whether the parcel had been stolen by some one of the company's servants) "to the jury, because there was in my opinion no evidence whatever for them that any felony had been committed by any one of the servants of the company. In truth, unless the courts in cases of this sort take upon themselves the duty of deciding, the statute (11 G. 4 & W. 4, c. 68), which was intended for the protection of the carrier, will become a dead letter; for, juries always will find felony as against a company. I think it is the duty of the presiding judge to withdraw the question altogether from the jury, and not to allow them an opportunity of finding in favour of the plaintiff in defiance of all evidence. I therefore think the judge of the county court in this case was wrong in leaving it to the jury at all, and that he ought at once to have directed a nonsuit." For these reasons, it seems to me that there is no ground for disturbing the conclusion of the jury. Rule refused.(a)

(a) From the language of the judgment, it would seem that, if the box had been received by the servants of the company at Augusta Place, Worthing, and had been delivered by them at the Queen's Head, in London, and so had been in their custody and under their control during

May 26. *Bovill*, Q. C. (with whom was *Creasy*), in pursuance of the leave reserved to him at the trial, now moved *to enter a verdict for the defendants on the second issue, on the ground that there [*318 was no evidence of a joint bailment by the two plaintiffs. There was no joint property in the box or its contents. The delivery of it to the company was by one of the plaintiffs only (John Thomas Metcalfe), and it was directed to him, and the carriage of it was paid by him. [WILLES, J.—Which was the owner of the deal box?] That did not appear. [COCKBURN, C. J.—Why should it be the less a joint bailment because the contents were in part the separate property of each of the plaintiffs? This is a very unworthy objection for the company to take. Suppose the plaintiffs had each brought a separate action, what observations would there not have been made upon the conduct of the attorney? BYLES, J.—I reserved leave to amend by striking out the name of one of the plaintiffs. The only consequence, therefore, of the success of this miserable objection would be, that the one who is struck out might bring another action, and might come better prepared with evidence of the felony.]

COCKBURN, C. J.—I think there should be no rule in this case. I think there was abundant evidence of a joint contract. The box appears to have contained property belonging separately to each of the plaintiffs, but none in which they had a joint ownership. The question is whether there was a delivery to the company to be carried on behalf of the two jointly. I am of opinion that there was. The delivery was not by the hand of either of the plaintiffs; but by a third *person, with [*319 whom the company contracted as with the agent of an unknown principal. Having so contracted with him, it turns out that he was agent, not for one of the plaintiffs only, but for both. If so, the contract was with the two jointly.

WILLIAMS, J.—I also am of opinion that there was a joint contract, and a joint consideration: and, if so, the authorities establish that it is immaterial that the plaintiffs have separate interests in the subject-matter. This appears from the following passage in 1 Rolle's Abridgment, *Action sur Case* (Z), pl. 9,—"Si en action sur case per A. et B. vers C., soit recite en le declaration que lou certain particuler avers appertient al A., et auters particuler avers appertient al B., fueront toll per person nemy conus, en consideracion de 10*l.* done per A. et B. al C., C. assume et promise a procurer les ditz avers d'estre restore al A. et B., et pur ceo que les avers ne fueront restore ils porteront cest action: cest action est bien port joyntment per A. et B., coment que les avers que appertient al A. doint estre restore a luy, et les autres avers a B., et issint le chose d'estre performe severall et nemy joynt, uncore entant que le contract est joynt et le consideracion joynt, et n'est conus quant lun done et quant l'auter, l'action est bien port joyntment. Hill 1649, enter Ivans et Raans *v.* Draper, adjudge, ceo esteant move en arrest de judgment."(*a*) *That authority establishes that, if this had been an action upon [*320

the whole of the transit, it would equally have been held that there was no evidence to go to the jury that its contents had been abstracted *by a servant of the company*.

(*a*) This case is cited in Vin. Abr. *Actions* (Z,) pl. 9, in marg., by the name of Vaux *v.* Steward; and it is also reported three times in Style, pp. 156, 157, 203. On the first occasion, Roll, C. J., is reported to have said: "The promise here is entire, for the consideration is entire, and so the action may be jointly." On the second occasion, he held, "that it is an entire promise, and a joint consideration, though the cattle taken were several, and therefore the action may be

the contract itself, it would properly have been a joint action. And, *321] although this is not an *action upon the contract, but for a breach of duty, still it is founded on contract, and must follow the general rules as to joinder which govern actions ex contractu.

WILLES, J.—I am entirely of the same opinion. It is certainly a very strange question for the company to raise, inasmuch as the only effect of holding the contract to have been with each separately, would be that the company must be harassed by two actions when the whole merits might be disposed of in one. The remedy would be by striking out the name of George Metcalfe, to whom the box was not addressed, and who did not pay the carriage of it, pursuant to the leave reserved at the trial. But it appears to me that the point is disposed of by saying that there was some evidence that the box with its contents was delivered to the company upon a joint contract to be carried for the two plaintiffs, because it was delivered by a person who might reasonably be considered to have been at the time the servant of both. No evidence appears to have been given as to the ownership of the box: but it was in the joint use of the two plaintiffs for the purpose of the journey. I think there was enough evidence to warrant the jury in concluding that there was a joint delivery of the box to the company, and a receipt of it by them under a joint contract, and therefore that the action was well brought in the names of the two plaintiffs.

BYLES, J., concurred. Rule refused.

joint; and, if one lay out money for a thing assumed to be done for a third person, if it be not done an action shall be brought upon the assumpsit by him who laid out the money." But, "because a case was cited out of Yelverton's Reports (Rippon v. Morton, Yelv. 1) to be against the opinion of the court, therefore the court ordered the counsel to bring that case, and in the mean time they would advise." On the third occasion, the case is thus stated:—"Vaux and Vaux brought an action upon the case against Draper, upon a promise, and declared that the defendant, in consideration of 10*l.* paid by the plaintiffs unto the defendant, did assume and promise unto the plaintiffs to procure certain cattle of the plaintiffs taken from them by a third person, to be redelivered unto them by such a time, and for not performing this promise they brought their action. Upon non assumpsit pleaded, there was an issue joined, and a verdict found for the plaintiffs. The defendant moved in arrest of judgment, that this action was not well brought jointly by the plaintiffs, but that they ought to have brought two several actions, in regard that the promise upon which the action was founded was not an entire promise, but was a several promise made to each of the plaintiffs. The counsel on the other side prayed for judgment, and said the promise was entire, made to both, and not several, and so the jury have found it, which shall be intended to be true: and, if it should not be so, it would be disadvantageous for the defendant. Hales said, on the other side, that the assumpsit is several, and the acts to be done by the defendant to the plaintiffs are several, although the assumpsit sounds as a joint assumpsit. Roll, C. J., said, that the consideration given is entire and cannot be divided, and there is no inconvenience in joining in the action in this case: but, if one had brought the action alone, it might have been questionable. Nicholas and Ask, justices, of the same opinion. But Jerman, justice, differed, and said that these are several promises, viz., to deliver such chattel severally to each of them as did belong properly to them, and so there must be two several actions. But judgment was given for the plaintiff, except better matter showed."

*PORTMAN *v.* MIDDLETON and Another. *May* 6. [*322

A. contracted with B. to repair a steam threshing-machine, undertaking to get it ready for harvest time. A new fire-box being needed, C. engaged to make one for A. "in about a fortnight," but failed in the performance of his contract, and A. (who had paid C. for the article) was obliged to get one made elsewhere, at an additional cost; but this he did not do in time to enable him to perform his contract with B. (although there was ample time for him to have done so after C. had broken *his* contract); whereupon B. sued A., who paid him 20*l.* to settle the action:—Held, that A. was entitled to recover from C. the sum he had paid him for the fire-box, and the extra cost incurred in getting another; but that the compensation paid by A. to B. was not such a damage "as might fairly and reasonably be considered either as arising naturally from C.'s breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it,"—within the rule in Hadley *v.* Baxendale, 9 Exch. 341.†

THIS was an action for a breach of contract in not delivering a fire-box within the time stipulated.

The declaration stated that the plaintiff, before the time of the making of the agreement with the defendant thereinafter mentioned, had been employed by a certain person to repair and put in order for him a steam threshing-engine, the said engine to be finished and delivered to the said person by a certain specified time, at and on certain reward to be paid to the plaintiff by the said person; and thereupon the plaintiff retained and employed the defendant to make or repair for him a fire-box for the said steam threshing-engine of a certain size, and according to certain instructions given to the defendant by the plaintiff, and by a time agreed upon between the plaintiff and the defendant, which said retainer the defendant accepted at and for the sum of 12*l.*, and which said sum the plaintiff paid to the defendant before the delivery by the defendant of the fire-box thereinafter mentioned: Averment, that although the defendant had delivered a fire-box as and for the fire-box so agreed to be made or repaired by him for the plaintiff, yet he did not do the same by the time agreed upon between the plaintiff and the defendant, nor according to the said instructions of the plaintiff, but wholly neglected and disobeyed the same instructions; and although, when the plaintiff so employed the defendant to make or repair the said *fire-box, he [*323
informed the defendant for what purpose he required the same, and of what size and materials the same must be, and by what time the plaintiff had contracted with the said person to finish and deliver the said steam threshing-machine, and which said time had long elapsed; yet the defendant had made and delivered to the plaintiff a fire-box unsuited to and unfit for the said steam threshing-engine, imperfect in materials, and different in size from the fire-box agreed to be made by the defendant, and wholly useless to the plaintiff, and that the defendant had refused to make a fire-box fit for the steam threshing-engine, or to return the said sum of 12*l.* to the plaintiff; whereby the plaintiff had not only lost the said sum of 12*l.* so paid by him to the defendant, but had incurred great expense in and about constructing a fit and proper fire-box for the said steam threshing-engine, and was also liable to make compensation to the said person for the delay in delivering the said steam threshing-machine to him, such delay being caused by the wrongful conduct of the defendant.

There were also counts for money payable by the defendant to the

plaintiff, and for money received by the defendant to the use of the plaintiff.

The defendant traversed the retainer and the alleged breaches of contract, and also pleaded never indebted; whereupon issue was joined.

The cause was tried before Channell, B., at the last Assizes at Worcester. The facts were as follows:—In the spring of 1857, the plaintiff, an engineer, was employed by one Sheaf to repair a steam threshing-engine; the work to be finished before harvest, or by the end of July or the beginning of August. It being found necessary to get a new fire-box made, the plaintiff in June went to the defendants at Birmingham
*324] and verbally contracted with them to make one for *him for 12*l.* Upon inquiring how long it would take to make it, the defendants' foreman answered, "About a fortnight." The fire-box was not sent to the plaintiff until the 3d of September, when it was found to be useless. The plaintiff was then obliged to employ another person to make another fire-box, for which he had to pay 20*l.* The threshing-engine, in consequence of these delays, not being ready until November, Sheaf brought an action against the plaintiff to recover damages in respect of his breach of contract, claiming 50*l.*; but he ultimately settled the matter by accepting 20*l.* and costs, making together 25*l.* 17*s.*

It did not appear that the plaintiff, when he gave the defendants the order for the fire-box, communicated to them the nature of his contract with Sheaf; or that they were made aware of it until after there had been a complete breach of that contract; although there was some evidence of a conversation between Sheaf and the defendants upon the subject in the month of June.

Under the direction of the learned Baron, the jury returned a verdict for the plaintiff for the 12*l.* which he had paid the defendants for the fire-box, 8*l.* for the extra expenses he had incurred in procuring another, and 20*l.* in respect of the compensation he had paid to Sheaf for the non-performance of his contract with him.

Pigott, Serjt., on a former day in this term, pursuant to leave reserved, obtained a rule Nisi to reduce the damages by the sum of 20*l.* on the grounds that no precise time was contemplated by the contract between the plaintiff and the defendants, and that the payment to Sheaf was not a damage fairly resulting from the defendants' breach of their contract.

*325] *Huddleston*, Q. C., and *R. Kettle*, on a subsequent day, *showed cause.—The plaintiff is entitled to recover, not only the sum he had paid to the defendants for the useless fire-box, and the 8*l.* which he was obliged to pay to procure another, but also the damages he was compelled to pay to Sheaf for his breach of contract, which but for the defendants' failure to perform their contract with him he would not have incurred. The rule as laid down by the Court of Exchequer in Hadley v. Baxendale, 9 Exch. 341,† is, that, "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." That rule was acted upon in

Bramley, app., Chesterton, resp., 2 C. B. N. S. 592 (E. C. L. R. vol. 89), where it was held, that, where a tenant holds over after the expiration of a notice to quit, the landlord is entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenants' wrongful act had prevented him from delivering possession. In giving judgment, Cockburn, C. J., says: "This use of the land by the landlord, viz., the letting it to a new tenant, is the common and ordinary course of dealing on the part of an owner of land. The defendant, therefore, must have understood, that, when the plaintiff gave him notice to quit, he would enter into a contract with a new tenant to let the premises to him from the expiration of such notice. And in this case there is the further and not unimportant fact that the tenant was apprised of the fact that the *landlord had relet the premises, [*326 and consequently was aware of the inconvenience and loss he was exposing him to by his improper conduct. I therefore think it not at all unreasonable, but, on the contrary, very salutary, to hold him liable to compensate his landlord to the extent of the natural and necessary consequences of his wrongful act."(a) The natural consequence resulting from the non-performance of the defendants' contract, was, the non-completion by the plaintiff of his contract with Sheaf. [CROWDER, J.—The damages claimed by Sheaf could hardly be said to be the natural consequence of the defendants' breach of their contract with the plaintiff.] At all events, it comes within the second branch of the rule laid down in Hadley *v.* Baxendale: it might reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it; for, the defendants knew that the article was wanted for the ensuing harvest, and that the inevitable consequence of the non-performance of their contract would be that the plaintiff would be unable to perform his contract with Sheaf. [BYLES, J.—There was no evidence that the defendants were aware of the plaintiff's contract with Sheaf until after breach.]

Pigott, Serjt., in support of the rule.—The plaintiff is, no doubt, entitled to recover back the 12*l.* he paid for the fire-box, and also the 8*l.* for the difficulty in getting another one: but he clearly is not entitled to *recover anything in respect of the contract which he had made [*327 with Sheaf. At the time the order was first given, in June, the plaintiff did not communicate to the defendants his engagement with Sheaf to have the threshing-engine ready in time for harvest; nor did he do so until after there had been a complete breach of the contract between him and Sheaf. Damages from the plaintiff's breach of his contract with Sheaf clearly could not have been in the contemplation of the parties as flowing from the breach of the defendants' contract with the plaintiff, so as to bring the case within the rule in Hadley *v.* Baxendale. As soon as the defendants had broken their contract, it was the plaintiff's duty to put himself in a position to perform his contract with Sheaf, by procuring a fire-box elsewhere,—Peterson *v.* Ayre, 13 C. B. 365 (E. C. L. R. vol. 76), per Maule, J.,—and he had ample time to

(a) Willes, J., observed that he was erroneously reported in this case to have said,—"I would wish, however, to guard myself from admitting, that, *apart from contract*, the tenant is liable for holding over;" and that it ought to have been, "that, *in an action of contract*, the tenant would be liable for holding over."

do this before the commencement of harvest; for, it appeared that it could have been made in a fortnight. It would be monstrous to hold the defendants responsible for the breach of a contract with a third party, the terms of which they were wholly unacquainted with.

Cur. adv. vult.

CROWDER, J., now delivered the judgment of the court:—

This case was argued on Friday last before my Brothers Willes and Byles and myself. The rule sought to reduce the damages: and we are of opinion that it must be made absolute. The action was brought to recover damages for the breach of a contract entered into between the plaintiff and the defendant, under which the defendant was to furnish a fire-box for the plaintiff by a given time. The article was not furnished
*328] within the time, and, when it was sent to the *plaintiff, it was found to be utterly useless. The plaintiff, who had paid the sum agreed on, viz. 12*l.*, sought to recover back that sum, together with the damages which he had sustained by reason of the defendants' breach of contract. The jury gave a verdict for 12*l.*, the sum paid, and a further sum of 8*l.* for the extra expense which the plaintiff was put to in procuring another fire-box, and about which there is no dispute. They also gave a further sum of 20*l.* as special damage arising from the defendants' breach of contract. The question is whether the jury were warranted in giving this latter sum. We are of opinion that they were not. The special damage was sought to be recovered by reason of the plaintiff's having entered into a contract with one Sheaf to repair for him a steam threshing-machine. The contract between the plaintiff and the defendants as to the fire-box was quite separate and distinct from that. The defendants had nothing whatever to do with the contract between Sheaf and the plaintiff. But it was said, that, inasmuch as Sheaf had brought an action against the plaintiff for his breach of contract,—a breach of contract occasioned by the insufficiency of the article furnished by the defendant,—and had recovered damages (or been paid a sum of 20*l.*) for the breach of that contract, that was a damage which the plaintiff was entitled to recover against the defendants for the breach of *their* contract. We think, however, that this case is entirely governed by that of Hadley *v.* Baxendale, 9 Exch. 341,† to which reference was made, and does not come within that rule by which alone this sum could be recovered as special damage. It is laid down by the Court of Exchequer in Hadley *v.* Baxendale, that, "where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive
*329] in respect of such breach of contract, should be such as *may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Now, it is quite clear that this special damage was not the ordinary consequence of the breaking of the defendants' contract. The only question was, whether it came within the second part of the rule as above laid down,—that the breach of contract was such as that the damage arising from it might be supposed to be in the contemplation of both parties at the time they made the contract. We have looked carefully at the notes of the learned judge who tried the cause, and we cannot find that there is any such evidence as would lead

to the conclusion that it was in the contemplation of the parties that the breach of the contract entered into between the plaintiff and Sheaf, and the damages recovered by him (Sheaf) in consequence, would be the probable result of the breach by the defendants of their contract to furnish a fire-box to the plaintiff. We therefore think that the rule to reduce the damages should be made absolute: and we cannot help thinking,—the action being brought to recover back the sum of 12*l.*, the amount agreed to be paid for the fire-box,—that it would be a monstrous conclusion to arrive at, that the breach of the contract in not furnishing the article contracted for at that price, should give rise to the additional damages of 20*l.* here sought to be recovered. Rule absolute.

*LEWIS *v.* BARKES. [*330

LEWIS *v.* BLAGDON, and six other Causes. *April* 19.

Actions having been brought against eight several defendants upon mutual insurance policies, the court, at the instance of the defendants, granted a rule for consolidating them,—upon the terms that the several defendants should admit the *amounts* for which they were respectively liable, in case their liability should be established, and should consent, if necessary, to an order referring it to the master to settle the same.

EIGHT several actions had been brought by the same plaintiff against the above-named several defendants as members of a mutual assurance association called The London Marine Assurance Association, upon one and the same policy of assurance. The plaintiff having declared in each action as for a constructive total loss, a summons was taken out on behalf of the defendants before Pollock, C. B., calling upon the plaintiff to show cause why the said actions should not be consolidated. The plaintiff declined to consent to a consolidation, except upon the following terms, "that the said defendants should state the proportions in which they are respectively liable; that the said defendants should admit themselves to be members of the said assurance association, and should also admit that one Thomas Denham was their agent duly authorized to execute the policy of assurance expressed to be granted by him to the plaintiff." The learned Chief Baron thereupon referred the matter to the court.

Scotland, accordingly, on a former day in this term, moved for a rule to consolidate the actions. He submitted that there was no ground for deviating in this case from the ordinary course of practice, by imposing terms upon the defendants such as those proposed at chambers.

O'Malley and *H. Lloyd* showed cause.—This is not an ordinary consolidation rule. The terms proposed are not unreasonable. The plaintiff here would be bound to prove what in the ordinary consolidation rule is *admitted,—the proportions being ascertained by the policy. [*331
Here, it is conceded, there is a different case as to each defendant; but there is one question common to the whole of the cases, viz. the cause of the loss. The terms here proposed were enforced by Cresswell, J., at chambers, in another case. In Everth *v.* Blackburn, 6 M. & S. 152, terms were imposed upon the defendant. [BYLES, J.—Let those defendants consolidate who are willing to admit their proportions.]

Scotland, in support of his rule.—There is no pretence for binding the defendants in the way suggested. In Hollingsworth *v.* Brodrick, 4 Ad. & E. 646, 6 N. & M. 240, which generally governs these cases, two actions having been brought by the same plaintiff against different defendants, on the same policy of insurance, the court consolidated them after a declaration had been delivered in one, and an appearance entered in the other, at the instance of the defendant in the latter action, though the plaintiff objected. In Everth *v.* Blackburn, money was paid into court, and therefore the liability to some extent was admitted. If this rule is granted, the only effect will be, that, if the plaintiff obtains a verdict against the defendant against whom he elects to proceed, the other defendants are all bound by it; whereas, if he fails in that one action, he may still try the others. [CROWDER, J.—You probably will not object to the admission of the amount in each case, provided your admission does not extend to an admission of liability?] That seems to be reasonable. Cur. adv. vult.

WILLES, J., now proceeded to deliver the judgment of the court:—(*a*)

*332] *The question in this case was, whether several actions upon mutual insurance policies ought to be consolidated, according to the usual practice in actions upon ordinary policies.

We think that no sufficient objection to such consolidation has been put forward. The defendants will be bound by the decision of the first case, if in favour of the plaintiff. The plaintiff, if he fail in his first case, will be at liberty then to try the others. As to the delay which may be occasioned to the plaintiff, that will be fully compensated by his obtaining judgment in all the actions, if he succeed in the one selected. The defendants, by entering into the rule, agree to judgment against all, in case the plaintiff succeeds against any one defendant. The plaintiff may select a defendant within a week.

As to the amount for which judgment is to be signed in case the plaintiff succeeds, the defendants must within a week state how much they are respectively liable for, in case their liability be established, and must consent, in case it becomes necessary, and the plaintiff applies for an order to that effect, to a reference to the master as to amount, upon such terms as to costs as the judge shall think fit. The rule must, therefore, be absolute, in the ordinary form, with the above additions.

Any difficulty in settling it, may be brought before a judge at chambers. Rule absolute.(*b*)

The rule was drawn up as follows:—"It is ordered that the said defendants, within a week, deliver to the said plaintiff or to his attorney a statement in writing of the amounts for which judgments are to be

*333] signed in case the plaintiff succeeds, and for which they are *respectively liable in the event of their liability being established as hereinafter mentioned; the said plaintiff, within a week after the delivery of such statement, electing against which one of the said defendants he will proceed to trial: and that all further proceedings in

(*a*) The case was argued before Crowder, J., Willes, J., and Byles, J.

(*b*) In M'Gregor *v.* Horsfall, 3 M. & W. 320,† 6 Dowl. P. C. 338, where two actions were brought by the same plaintiffs against different defendants, on different policies of insurance on the same ship, the court refused, at the instance of the defendants, to compel the plaintiffs to consolidate and to be bound in one of the actions, without their consent. And see Syers *v.* Pickersgill, 27 Law J., Exch. 5.

the said other causes respectively be stayed until after such trial shall be had; the defendants in such other causes respectively, by their counsel, hereby undertaking, in case a verdict shall be found for the said plaintiff on the said trial, to be bound and concluded thereby, and consenting in that event to a judgment being entered against each of them in the said causes, for such amounts respectively as shall be so stated by the said defendants, or ascertained as hereinafter mentioned: And it is further ordered, in case the said plaintiff shall not succeed in the action so to be tried as aforesaid, then that he be at liberty to proceed in such other causes; and, in the event of his succeeding against any one of the said defendants, the said other defendants respectively (*a*) hereby consent to a judgment being entered against them as aforesaid, notwithstanding the said plaintiff shall have failed in the cause so firstly directed to be tried: And, by consent of counsel for the said defendants respectively, it is further ordered that the plaintiff shall be at liberty, if necessary, to apply to a judge for an order to refer it to one of the masters of this court to ascertain the amounts for which such judgments shall be so entered as aforesaid, and upon such terms as to costs as to the said judge shall seem meet."

(*a*) Other, of course, than the defendant who has obtained a verdict.

*HOLE *v.* BARLOW. *May* 5. [*334

In an action for a nuisance arising from the burning of bricks on the defendant's own land near to the plaintiff's dwelling-house, the judge told the jury that "no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its being so carried on;" and he left to them two questions,—first, "was the place in which the bricks were burned a proper and convenient place for the purpose,"—secondly, if they thought the place was not a proper place for the purpose, then, was the nuisance such as to make the enjoyment of life and property uncomfortable:—Held, no misdirection.

THIS was an action for a nuisance. The declaration stated that the plaintiff was possessed of a certain messuage and dwelling-house, garden, and appurtenances which he the plaintiff inhabited and still inhabits, and that the defendant, contriving and intending to injure and annoy the plaintiff, erected and made a certain brick-kiln upon the land of the defendant in front of the house of the plaintiff, and wrongfully and injuriously burned a large quantity of bricks, and caused a noxious and unwholesome vapour to arise, to the injury of the premises of the plaintiff; and that the plaintiff's house was thereby during all the time, and still was, rendered uncomfortable, unhealthy, unwholesome, and unfit for habitation, &c.

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before Byles, J., at the sittings at Westminster after the last term, when the following facts appeared in evidence:—The plaintiff occupied a house in a newly-formed road abutting upon a field belonging to the defendant, and upon which the defendant, preparatory to the building of certain houses thereon, had excavated the clay and converted it into bricks, which he caused to be placed in three "clamps" for burning, near to the plaintiff's dwelling-house, one of

them being within thirty feet of it. There was abundant though conflicting evidence of annoyance.

On the part of the defendant, it was submitted that the thing complained of was not actionable, seeing that it was done in a convenient place, and not wantonly and with intent to injure or annoy the plaintiff.

*335] *In submitting the case to the jury, the learned judge in substance told them that, "to entitle the plaintiff to maintain an action for an injury of this nature, it is not necessary that the thing complained of should be injurious to health: it is enough if it renders the enjoyment of life and property uncomfortable. If you are satisfied from the evidence that the enjoyment of the plaintiff's house was rendered uncomfortable through the instrumentality of the defendant, that is sufficient to entitle the plaintiff to maintain this action. But that is subject to this observation,—that it is not everybody whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade in the neighbourhood, that can bring an action. If that were so,—as has already been observed by the learned counsel for the defendant,—the neighbourhood of Birmingham and Wolverhampton and the other great manufacturing towns of England would be full of persons bringing actions for nuisances arising from the carrying on of noxious and offensive trades in their vicinity, to the great injury of the manufacturing and social interests of the community. I apprehend the law to be this, that no action lies for the use, the reasonable use, of a lawful trade in a convenient and proper place, even though some one may suffer annoyance from its being so carried on. But it may be that it would not be justifiable to place clamps for brick-burning in the immediate vicinity of Berkeley, or Belgrave, or Eaton Squares. But it is a very different thing to say that the mere temporary burning of bricks, made from clay dug from the spot, in a new neighbourhood in the outskirts of London, which no one could say was an inconvenient place for the purpose, though it might cause annoyance to one or two persons residing near, would afford a ground of action. If this were so, it would be exceedingly difficult to find any

*336] place *within a reasonable distance at which this sort of trade could be exercised at all. It is, therefore, my duty to tell you that this action will not lie, although you should be of opinion that the nuisance complained of is such as to render the plaintiff's enjoyment of his life and property uncomfortable, if you should think that the place where the business is carried on was a convenient and proper place for the purpose. There is one further observation I must make, and it is this,—It used to be thought that, if a man went to reside near to a place where he knew there was a nuisance, he could not complain of it, inasmuch as he went to the nuisance. That was supposed to be the law many years ago: but it is not so now. Assuming that this plaintiff perfectly well knew that the defendant was about to burn bricks on his land, and knew the precise spot where the clamps would be placed, and knew what the result would be, when he came to reside there, still that would not disentitle him to maintain this action. The two questions which I purpose leaving to you are,—first, was the place in which these bricks were burned a proper and convenient place for the purpose? That seems to me to be not a question of law for me, but one of fact for you upon the evidence you have heard. If you think, looking at all

the circumstances, it was a proper place, then, although the plaintiff's enjoyment of his property may have been rendered uncomfortable, he cannot maintain an action. Secondly, if you are of opinion that the place was not a proper place for the purpose, then was the nuisance such as to make the enjoyment of life and property uncomfortable? These are the two questions which you have to decide, upon the evidence which has been laid before you."

The jury having returned a verdict for the defendant,

*Aspland, on a former day in this term, obtained a rule nisi [*337 for a new trial, on the ground that the learned judge misdirected the jury, in telling them "that an action did not lie for the acts complained of as a nuisance, if carried on in a proper and convenient place, and that an action did not lie for causing annoyance by carrying on a lawful trade, if carried on in a proper and convenient place; and in directing the jury that there were two questions for them,—one being, was the place a proper place? and that, if so, although the plaintiff's enjoyment might have been rendered uncomfortable, he could not sue,—the other being, whether the nuisance was such as to make the enjoyment of life and property uncomfortable; and in directing the jury to find for the defendant, if they thought the place a proper place, although the plaintiff's enjoyment might have been rendered uncomfortable: and on the ground that the verdict was against the evidence."

Collier, Q. C., and *Garth*, now showed cause.—There was evidence and abundant evidence for the jury on both sides, and there is no pretence for disturbing their verdict. [BYLES, J.—There certainly was strong evidence on both sides: but I must say I rather expected that the jury would find for the plaintiff.] Then it is said that the learned judge was wrong in leaving it to the jury to say whether the place in which the bricks were burned was a proper place for the purpose, and in telling them that if they thought, looking at all the circumstances, it was a proper place, although the plaintiff's enjoyment of his property may have been rendered uncomfortable, he could not maintain an action. In all the authorities, however, upon the subject, from the earliest time to the present, the locality has always been considered a material ingredient. In Comyn's *Digest, *Action upon the Case for a Nuisance* [*338 (C), it is said: "An action upon the case does not lie upon a thing done to the inconvenience of another; as, if a man erect a mill near to the mill of another, whereby the other loses part of his profit. 1 Rol. 107, l. 20; 11 H. 4, fo. 47 b. So, it does not lie for a reasonable use of my right, though it be to the annoyance of another; as, if a butcher, brewer, &c., use his trade *in a convenient place*, though it be to the annoyance of his neighbour." That is almost identical with the proposition put by the learned judge in his summing up here. In Rich *v.* Basterfield, 4 C. B. 783 (E. C. L. R. vol. 56), which was an action for a nuisance arising from smoke issuing out of the defendant's chimney to the inconvenience of the plaintiff in his occupation of an adjoining house, Erle, J., in leaving the case to the jury, told them that "every man is bound so to use his property as not to injure his neighbour's rights,—with this qualification, that he may make a reasonable use of his own rights, exercising them in a reasonable place."(a) In Jones *v.*

(a) This can hardly be correctly expressed; for, no man can be said to make a reasonable use of his own rights, if that use conflicts with a pre-existing *right* of his neighbour.

Powell, Palmer 536, 539, Hutton 135 (cited in Gale on Easements, 2d edit. 293), Hide, C. J., says: "Un tan-house est necessary, car touts wear shoes: et uncore ceo poit estre pull down, &c., si est erect al nusance d'auter: et issint de glass-house; et pur ceux doient estre erect in places convenient pur eux." In Rex *v.* Pierce, Shower 327, an information was brought against the defendant by the recorder of London, for erecting and continuing a soap-boilery in Wood Street. It was held by Jefferies, C. J., "that, though such a trade is honest, and may be lawfully used, yet if by its stench it be an annoyance to the neighbours, *339] it is a *nuisance." A case is also mentioned of a "calendar-man in London, in Bread Street, who was convicted before Lord Hale on such an information; for that the noise of his trade disturbed the neighbours and shook the adjacent houses:" and another case of a brew-house on Ludgate Hill, Rex *v.* Jordan, where the defendant was compelled to prostrate the same and convert it to other purposes; "for that such trades ought not to be in the principal parts of the city, but in the outskirts." In Baines *v.* Barker, Ambler 158, 3 Atkyns 750, Lord Hardwicke refused to grant an injunction to stay the building of a small-pox hospital in Cold Bath Fields, very near the houses of several of the plaintiff's tenants, though it appeared that in the lease of the house in question, granted by the plaintiff to the defendant, there was a covenant against turning it into a brew-house, because it would be a nuisance. The Lord Chancellor said: "I am of opinion it is a charity likely to prove of great advantage to mankind. Such an hospital must not be far from a town, because those that are attacked with that disorder in a natural way may not be carried far." All these cases show that the locality is a material ingredient in the inquiry of nuisance or no nuisance; and if so, the direction of the learned judge was unexceptionable. It was for the jury to say whether the defendant bonâ fide carried on his business of brick-burning in a manner and in a place which were proper and convenient.

Shee, Serjt., and *Aspland*, in support of the rule.—The weight of the evidence preponderated greatly in favour of the plaintiff. [CROWDER, J.—There was evidence on both sides; and I do not understand the learned judge to say that he is dissatisfied with the result: we can hardly, therefore, interfere upon that ground.] No doubt the opinion of the *340] jury was entirely *influenced by what fell from the learned judge. The substance of his direction to them was,—"No matter how injurious may be the thing complained of, or how much it may interfere with the comfortable enjoyment of the plaintiff's dwelling-house, provided the place is a convenient one for the purpose, no action will lie." [BYLES, J.—What I meant to say, was, that the circumstance of the thing being done in a convenient and proper place, would justify some degree of annoyance. I had the passage in Comyns's Digest in my mind at the time.] The passage relied upon by the other side, has no authority cited to vouch it. Comyns says,—*Action upon the Case for a Nuisance* (A), that "an action upon the case lies, if a man erect anything offensive so near the house of another, that it becomes useless thereby; as, a swine-stye (Aldred's Case, 9 Co. 59 a; 2 Rol. 141, l. 13), or a lime kiln (Aldred's Case, 2 Rol. 141, l. 5), or a dye-house (Jones *v.* Powell, Hutton 135), or a tallow furnace (Morley *v.* Pragnell, Cro. Car. 510; 1 Rol. 88, l. 41),—*but, if he be a chandler, quære*, 1 Rol. 88, l.

48; 2 Rol. 139, l. 2,—or a privy or brew-house (Jones *v.* Powell, Hutton 136, Palmer 539), or a tan-fatt (Jones *v.* Powell), or a smelting-house (1 Rol. 89, l. 15), or a smith's forge (Bradley *v.* Gill, 1 Lutw. 69)." [BYLES, J.—A swine-stye might not be considered a nuisance in Bethnal Green: but it certainly would be so in Grosvenor Square.] The enjoyment of pure and undefiled air is the common-law right of every subject of Her Majesty, whether he resides in a hovel or a mansion. In the passage cited from Comyns (C), where it is said that an action upon the case does not lie "for a reasonable use of my right, though it be to the annoyance of another," it is somewhat remarkable that the word "offensive" is dropped. In a case of Walter *v.* Selfe, 29 Law J., Ch. 822, an injunction was granted by Vice-Chancellor Knight Bruce under very similar *circumstances to those of this case. There, the [*341 plaintiff was the owner of a house and pleasure-grounds at Surbiton, in Surrey, and the defendant purchased a piece of land, about an acre in extent, situate at a distance of less than one hundred yards from the plaintiff's house, and commenced burning bricks made of the clay dug therefrom: and an injunction was granted. The Vice-Chancellor says, in pronouncing judgment: "One of the plaintiffs in this case sues as the owner, and the other as tenant and occupier, of a parcel of land at Surbiton, in Surrey. The plaintiff's dwelling-house, with the out-buildings appurtenant to it, stands on part of the land, the other part consists of a garden or pleasure-ground or both, also belonging to the house. It is admitted that the house was built before the year 1829, and has been used and occupied as a dwelling-house continually from a time preceding that year. The land on its north-eastern part adjoins a portion or parcel of land containing more than one acre, but less than two acres in the whole, which belongs to the defendant, and on which in the spring or early in the summer of 1850 he began to manufacture bricks of the clay or earth of the same land, by burning in what I believe is a common mode of manufacturing, by means of a clamp. It does not appear that before 1850 any manufacture or process of that sort, or of any offensive, objectionable, or disagreeable kind, had been begun on any part of this portion of land, or carried on there." "The first point disputed, or not conceded, is, the question whether, as between the defendant, in his character of a person owning, using, and occupying his parcel of land, on the one hand, and the plaintiffs in their characters of owner and occupier of the house, offices, and gardens occupied by the plaintiff Mr. Pressly, on the other, Mr. Pressly is entitled to an untainted and unpolluted stream of air for the necessary supply and *reasonable use of himself and his family there, or, in other words, [*342 to have there, for the ordinary purposes of breath and life, an unpolluted and untainted atmosphere. There can, I think, be no doubt in fact or in law that this question must be answered in the affirmative, meaning by untainted and unpolluted air, not necessarily air as fresh, free, and pure as at the time of building the plaintiff's house the atmosphere then was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence." "The question then arises whether this is, or will be, an inconvenience to the occupier of Mr. Walter's house as occupier, a question which I think must be answered in the affirmative, though, whether to the extent of being noxious to human health, to animal health, in any

sense, or to vegetable health, I do not say, nor do I deem it necessary to intimate any opinion." "The important point next for consideration may properly, I conceive, be thus put,—ought this inconvenience to be considered in fact as more than fanciful, or as one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among English people? I am of opinion that this point is against the defendant; for, the plaintiffs have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort and existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, or whatever their state of health may be." In Viner's Abridgment, *Nusance* (G) pl. 16, it is said that "the stopping of wholesome air is a nuisance, as well as the stopping of the light." So, pl. 18, "If a *dyer erects a dye-house so near my house, by which I dare not dwell in this my house, for the stink of the smoke and other nastiness, this is a nuisance." And for these passages Aldred's Case, 9 Co. Rep. 59, is cited. In Stephen's Commentaries, 4th edit., Vol. 3, pp. 491, 492, it is said, that, "If a person keeps his hogs or other noisome animals so near the house of another, previously built and inhabited,(*a*) that the stench of them incommodes him, and makes the air unwholesome, this is a nuisance, as it tends to deprive him of the use and benefit of his house.(*b*) A like injury is if one's neighbour sets up and exercises any offensive trade; as, a tanner's, a tallow-chandler's, or the like; for, though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is 'sic utere tuo ut alienum non lædas:' this, therefore, is an actionable nuisance." "And upon the same principle it may be laid down generally, that if one does any other act, in itself lawful, which yet, being done in that place, necessarily tends to the damage of another's land, it is a nuisance; for, it is incumbent on him to find some other place to do that act, where it will be less offensive." If there be any such rule of law as suggested, it can have no application to a thing which is not done in the course of carrying on a trade. To entitle the defendant to immunity in a case of this sort, he must show a prescriptive right of twenty years user: Bliss *v.* Hall, 5 Scott 500, 4 N. C. 183 (E. C. L. R. vol. 33), 6 Dowl. P. C. 442; Flight *v.* Thomas, 10 Ad. & E. 590 (E. C. L. R. vol. 37), 2 P. & D. 531, 7 Dowl. P. C. 741.(*c*)

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*CROWDER, J.(*d*)—I am of opinion that this rule should be discharged. It was moved upon two grounds,—first, that the verdict was against the evidence,—secondly, for misdirection. As to the first ground, there was evidence on both sides of an extremely conflicting character: but the question was one especially for a jury; and the learned judge who tried the cause has not expressed himself dissatisfied with the result. That point, therefore, is disposed of. Then, with

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(*a*) See 1 Smith's Leading Cases, 4th edit. 131. But see Elliotson *v.* Feetham, 2 N. C. 134 (E. C. L. R. vol. 29), 2 Scott 174.

(*b*) Citing Morley *v.* Pragnell, Cro. Car. 510.

(*c*) See the authorities collected in a very elaborate judgment delivered by Vice-Chancellor Kindersley in Soltau *v.* De Held, 2 Simons, N. S. 133, 154.

(*d*) Williams, J., had gone to chambers.

respect to the alleged misdirection,—The complaint is that the learned judge put it to the jury as an ingredient for their consideration whether the burning of these bricks was in a proper and convenient place. By the language he used, he evidently referred to the passage which has been cited from Comyns's Digest, *Action upon the Case for a Nuisance* (C), and which is to be found in Selwyn's Nisi Prius, 10th edit. p. 1115, and in Gale on Easements 295. The question is, whether that is a misdirection. The passage from Comyns's Digest is as follows:—"An action upon the case does not lie for a reasonable use of my right, though it be to the annoyance of another; as, if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbour." The instances given certainly are of trades: and this defendant was not carrying on the trade of a brick-maker; but he was burning bricks upon his own land, for the purpose of building houses, which are necessary for the habitation of man. It seems to me that the rule is as applicable to the burning of bricks under such circumstances, as to the carrying on of a trade. It must be a question for the jury in each case whether or not the burning was in a convenient place. Without, therefore, going into the *facts of this case, I am of opinion [*345 that the direction of Brother Byles to the jury was consistent with all the authorities, and that we should be in effect overruling several of them if we were to make this rule absolute.

WILLES, J.—I am of the same opinion, and for the same reasons; and I will only add a word or two to what has fallen from my Brother Crowder. The common law right which every proprietor of a dwelling-house has to have the air uncontaminated and unpolluted, is subject to this qualification, that necessities may arise for an interference with that right pro bono publico, to this extent, that such interference be in respect of a matter essential to the business of life, and be conducted in a reasonable and proper manner, and in a reasonable and proper place. And this is not without analogy. Every man has a right to enjoy his character untainted and uncontaminated by the breath of slander: but that right is subject to the rule as to privileged communications, which justifies and permits a reasonable publication of defamatory matter, even though it should amount to a charge of felony. So, every man has a right to the enjoyment of his land: but, in the event of a foreign invasion, the Queen may take the land for the purpose of setting up defences thereon for the general good of the nation. In these and such like cases, private convenience must yield to public necessity. It seems to me that we shall be only acting upon that principle in discharging this rule.

BYLES, J., said nothing. Rule discharged.

Though it is difficult to lay down any precise rule on the subject, it seems to be admitted by all the authorities, that while there are certain trades or employments, which, when carried on in or near a town, are nuisances *per se*, such as a slaughter-house, or bone or soap-boiling establishment, or a distillery at which pigs are lodged and fed, yet that others, such as those of a livery-stable keeper, blacksmith, or ordinary manufacturer, are not necessarily so, unless where established in an improper location, or so carried on as to tend necessarily to the annoyance or injury of others: see Ray *v.* Lynes, 10 Alabama

63; Kirkman v. Handy, 11 Humphreys 408; Dargan v. Waddell, 9 Iredell 244; Coker v. Brize, 9 Georgia 426; 10 Id. 336; Smith v. M'Conachy, 11 Missouri 517; Whitney v. Bartholomew, 21 Connecticut 213; Howell v. M'Coy, 3 Rawle 286; Smith v. Cummings, 2 Parsons Eq. Cas. 100; Catlin v. Valentine, 9 Paige 575; Brady v. Weeks, 3 Barbour Sup. Ct. 157; Froh v. Dodge, 4 Denio 311; Peck v. Elder, 3 Sandford Sup. Ct. 126; Howard v. Lee, Id. 281. In determining whether a particular trade or its exercise created a nuisance, it is not necessary to show that it is actually prejudicial to health; it is sufficient if it be offensive to the senses, and render the enjoyment of life and property uncomfortable: Catlin v. Valentine, 9 Paige 575; Brady v. Weeks, 3 Barbour S. C. 157; Whitney v. Bartholomew, 1 Conn. 213.

*346] *PARKER v. IBBETSON. *April* 28.

An agreement was entered into between the plaintiff and the defendant in the following terms: —"A. engages to serve B. as agent or representative, at the salary of 150*l.* per annum: Also provided at the end of the year B. find A. has done sufficient business to justify him in recompensing by making up his salary to 180*l.*, to do so, being a donation of 30*l.* to his present stipulated amount of 150*l.*"

It being proved at the trial, that, by a general custom of the trade, a yearly hiring is determinable by a month's notice at any time:—Held, that there was nothing in the proviso to exclude the application of the custom to the particular case.

In an action upon the above agreement, charging a wrongful dismissal within the year, the judge left it to the jury to say whether the proviso was meant by the parties to exclude the custom: —Held, a misdirection; there being no ambiguity in the contract, and its construction being for the court.

THIS was an action against the defendant for wrongfully discharging the plaintiff from his service.

The first count of the declaration stated, that, by agreement between the plaintiff and the defendant, the plaintiff agreed to serve the defendant for one whole year in the capacity of agent or representative in the defendant's business of a manufacturer of woollen and mohair cloths, at a salary of 150*l.* per annum; that the plaintiff duly entered upon the said service; and that, although the plaintiff had always been ready and willing to continue in such service on the terms aforesaid, yet the defendant, before the expiration of the said year, refused thenceforth to allow the plaintiff to continue in his said service, and then wrongfully discharged him therefrom without any reasonable cause.

The declaration also contained counts for money paid, and for money found to be due upon accounts stated.

The defendant pleaded several pleas; amongst others,—first, a traverse of the agreement alleged in the first count,—fifthly, to the first count, that the plaintiff became and was the agent of the defendant, as in that count mentioned, upon certain terms and according to a certain condition annexed to the said contract by the general usage and custom in that behalf of and in the trade and business in which the plaintiff was so employed as aforesaid, that is to say, that either of the said parties
*347] might determine the said *service, upon giving to the other of them one calendar month's notice of his intention to do so, the plaintiff, in the event of the said service so being determined, and upon

the determination thereof, becoming and being entitled to claim from the defendant a proportionate part of his wages or salary aforesaid up to the expiration of such notice, and to the time of such determination of the said service: Averment, that theretofore, and one calendar month before the defendant put an end to the said service, or refused to suffer or permit the said plaintiff to continue in his said service, and discharged the plaintiff therefrom, he, the defendant, gave to the plaintiff one calendar month's notice of his, the defendant's, intention to put an end to the said service, and to discharge the plaintiff therefrom; and that the defendant at and after the expiration of the said calendar month refused to allow the plaintiff to continue in his, the defendant's, said service, and discharged the plaintiff therefrom,—which was the said alleged breach of contract in the first count mentioned. Issue thereon.

The cause was tried before Cresswell, J., at the sittings in London after last Michaelmas Term. It appeared that the defendant, who was a woollen merchant at Leeds, having a place of business in London, engaged the plaintiff to serve him in the capacity of agent or representative there, upon the terms contained in the following memorandum:—

"Memorandum of agreement made between Henry Ibbetson & Co., of Leeds, of the first part, and Richard Awood Parker, of, &c., of the second part: The aforesaid Richard Awood Parker engages to serve the said Henry Ibbetson & Co. as agent or representative, at the salary of 150*l.* per annum in consideration thereof. *Also provided at the end of the year the said H. Ibbetson & Co. find the said Richard Awood Parker has done *sufficient business to justify them in recompensing by making up his salary to* 180*l.*, *to do so, being a donation of* 30*l.*, *to his present stipulated amount of* 150*l.* As witness our hands this 30th day of January, 1857. [*348

(Signed) "Henry Ibbetson & Co.
"Richard Awood Parker."

The plaintiff continued in the service of the defendant under this agreement until the 1st of August (receiving his salary monthly), when the defendant gave him a month's notice to quit. For this dismissal, which the plaintiff contended was wrongful, and in contravention of the agreement, the present action was brought.

On the part of the defendant, several witnesses were called to prove a custom in the particular trade to dismiss at a month's notice, though the engagement was at a yearly salary: and it was proved that one house of great eminence adopted a form of hiring to exclude the custom for a month's notice: but some of the witnesses, on cross-examination, said they had never known an instance of a clerk having been dismissed at a month's notice, where the agreement stipulated for a bonus for good conduct at the end of the year.

In his summing up, the learned judge instructed the jury in substance as follows:—The plaintiff in this case complains that he has been dismissed by the defendant on a month's notice, notwithstanding he was engaged under a contract for a year. The defendant, on the other hand, says, "It is true I entered into a contract with you for a year, but, by the custom and usage of the place where the contract was made and was to be fulfilled, viz., London, a clerk or servant, though hired under such circumstances, is liable to be discharged, and entitled to put an end to the service, at a month's notice." No doubt, with

*349] *reference to domestic servants, the custom is universally so: a servant is hired at yearly wages; the hiring is yearly, but is liable to be terminated by either party on a month's notice. It does not, however, follow from that that the same state of things exists with regard to clerks and persons in the position of the present plaintiff. The circumstance of the contract being in writing makes no difference: it is not any stronger or more binding by being written, though it renders the proof of its terms more easy and less liable to misrepresentation or mistake. If that which is here put upon paper had simply been expressed by word of mouth, its legal operation and effect would have been precisely the same. In order to justify his dismissal of the plaintiff within the year, the defendant by his fifth plea sets up the custom of a month's notice: and, if he proves that to your satisfaction, whether the contract be in writing or not makes no difference. Now, the defendant has called before you several witnesses to prove the custom as alleged. It was not necessary, perhaps hardly possible, to adduce an instance exactly in point, of a person in the precise position of the present plaintiff. But you must judge from the general understanding of the trade in analogous cases, whether the parties meant to contract upon the footing of that custom. Where there is a general custom prevailing with reference to a particular trade in the place where a contract is made, and nothing is said to exclude it, the contract must be assumed to have been made subject to the importation of the custom into it. For instance, in a particular trade, a contract for the sale of goods, nothing being said to the contrary, is understood to be at a credit of a fortnight or a month,—in that case, the parties are supposed to contract with reference to the custom, and are bound by it. One of the defendant's witnesses

*350] states that it is the custom of the trade *generally to put an end to the service at a month's notice, where the hiring is yearly and at a yearly salary. Generally speaking, a yearly salary imports a yearly hiring; as in the case of a butler or a coachman: and, in the cases under the old settlement law, a general hiring at a yearly salary was always held to be a hiring for a year. The principal witness on the part of the defendant, however, on cross-examination, stated that he did not remember an instance of a clerk or agent in this particular trade having been dismissed at a month's notice, where the contract contained such a provision as in this case, for a bonus for good conduct at the end of the year. That, as it seems to me, may have some influence in determining your judgment upon this question. The parties first agree for a general hiring, at a yearly salary: then they add a proviso, that, if the employer shall *at the end of the year* consider the agent deserving of it, he shall be rewarded with a donation of 30*l*. Now, the only legitimate effect of that,—assuming the custom to have been established,—would seem to be, that, by introducing that stipulation into the contract, they meant the custom to be excluded. The first question, then, for your consideration will be, whether such a custom as alleged exists in the particular trade: and the second question will be, whether the contract was made with reference to the custom, or was a special contract to which the custom did not apply. If you think the evidence establishes the custom, it merely remains for you to consider whether you infer from the latter part of the agreement that the parties meant to exclude the application of the custom in the particular case. If you think they did

not contract with that intention, the defendant will be entitled to your verdict. If, on the other hand, you think the custom is not established, then the dismissal of the plaintiff before the *expiration of the year is not justified, and he will be entitled to your verdict, with such damages as you may think him fairly entitled to for such wrongful determination of the contract. [*351

The jury found,—first, that the custom was proved,—secondly, that the hiring was a special hiring, to which the custom did not apply; and thereupon they found for the plaintiff, damages 70*l.*

Hugh Hill, Q. C., in Hilary Term last, obtained a rule nisi to enter a verdict for the defendant, on the ground that, the jury having found the fact of the existence of the custom for the defendant, their finding as to the special terms of the contract was immaterial; or for a new trial, on the ground of misdirection, inasmuch as it was not a question for the jury whether the special terms of the contract excluded the custom, but the construction of the contract was for the court, and, according to the true construction, the custom was not excluded.

Pigott, Serjt., and *V. Williams*, now showed cause.—No leave to enter a verdict was reserved, consequently the most the defendant can have will be a new trial. It is said that the parties were bound by the custom, notwithstanding the special terms of the agreement. But, by the form of his fifth plea, the defendant has made it a question for the jury; and the jury have disposed of it, by negativing the application of the custom proved to the particular contract. . [CROWDER, J.—What more is this than a contract of hiring for a year, with a promise of a gratuity, under certain conditions, at the end of it?] The agreement contemplates that the relation of master and servant shall enure at all events until the end of the year. There is no ambiguity in the document: no exposition can be admitted to *contradict or vary its terms. No doubt, you may annex an incident to a contract, where the contract is silent upon the subject, or does not exclude it. But a party may always by special contract waive the benefit of a custom: Webb *v.* Plummer, 2 B. & Ald. 746; Hutton *v.* Warren, 1 M. & W. 466.† In Spartali *v.* Benecke, 10 C. B. 212, 222 (E. C. L. R. vol. 70), Wilde, C. J., says: "The rules of law relating to the admissibility of the usages of trade to affect the construction of written contracts, are well settled; and the difficulty that has arisen respecting them has been, in their application to the varied circumstances of the numerous cases in which the discussion of them has been involved. The rules of evidence applicable to the present case, are,—first, that, in mercantile contracts, evidence is admissible to prove that the words in which the contract is expressed, in the particular trade to which the contract refers are used in a peculiar sense, and different from the sense which they ordinarily import,—secondly, that evidence of usage is admissible for the purpose of annexing incidents to the contract in matters upon which the contract is silent: but both these rules are subject to the limitation or qualification, that the peculiar sense or meaning which it is proposed by the evidence to attach to the words of the contract, must not vary or contradict, expressly or by implication, the terms of the written contract." [CROWDER, J.—What is there here to show that the parties stipulated for any particular determination of the contract?] The proviso shows that they contemplated that it should not be [*352

put an end to until the expiration of the year. [BYLES, J.—It shows rather that they contemplated the *probability* of its continuance until the end of the year.] In the case of a clerk, a general hiring is a hiring for a year: Beeston *v.* Collyer, 12 J. B. Moore 552 (E. C. L. R. vol. 22), 4 Bingh. 309 (E. C. L. R. vol. 13). In The King *v.* Droitwich, 3 M. & Selw. 243, Lord *Ellenborough says: "I take the rule of
*353] law to be, that, if no particular time is expressed for the continuance of the service, or is reasonably to be implied, a hiring for a year is to be intended." In Snelling *v.* Lord Huntingfield, 1 C. M. & R. 20,† A. on the 20th of July, made proposals in writing (unsigned) to B., to enter his service as bailiff for a year: B. took the proposals and went away, and entered into A.'s service on the 24th of July: and it was held that this was a contract on the 20th, not to be performed within the space of one year from the making, and within the 4th section of the statute of frauds. In Fawcett *v.* Cash, 5 B. & Ad. 908 (E. C. L. R. vol. 27), a general hiring of a warehouseman, "the employer engaging to pay 12*l.* 10*s.* per month for the first year, and advance 10*l.* per annum until the salary should be 180*l.*," was held to be a hiring for a year. This subject underwent considerable discussion in Baxter *v.* Nurse, 7 Scott N. R. 801, 6 M. & G. 935 (E. C. L. R. vol. 46). Here, all the witnesses who were interrogated upon the subject negatived the application of the custom for a month's notice to the case of an agreement with the special stipulation contained in the agreement in this case. If this be a question for the jury, they have decided it for the plaintiff.(*a*)

Hugh Hill, Q. C., and *Buller*, were not called upon.

CROWDER, J.—I am of opinion that this rule must be made absolute. The question arises in an action brought upon an agreement entered into
*354] between a *clerk or servant and his employer in a certain trade, which agreement is in writing; and the contention at the trial was as to the existence of the custom stated in the fifth plea, and its application to the contract before the court. The jury were asked certain questions, and invited to draw certain conclusions. These were, whether the custom was proved, and whether, if proved, it was applicable to the special terms of this contract. On the part of the defendant, it is contended that this latter was not a question for the jury, but for the court; and I am of that opinion. Looking at the evidence, it seems to have been established that there was a general custom in the trade that a yearly hiring might be put an end to by either party upon a month's notice. It is insisted on the part of the plaintiff, that, assuming such a custom to exist, the special terms of this agreement exclude the application of it to this case. It seems to me that there is no foundation for that argument. The first part of the contract amounts simply to an engagement on the part of the plaintiff to serve the defendant as agent at the salary of 150*l.* per annum: then follows a proviso, that if, "at the end of the year the said Henry Ibbetson & Co. (the defendant) find the said R. A. Parker (the plaintiff) has done sufficient business to justify them in recompensing by making up his salary to 180*l.*, to do so, being a donation of 30*l.* to his present stipulated amount of 150*l.*" Reading this

(*a*) In Addison on Contracts, 4th edit. 430, it is laid down, upon the authority of a case of Johnson *v.* Blenkensopp, 5 Jurist 870, that, "If the contract is put into writing, the customary power of defeasance is impliedly annexed to the express terms of the written agreement, unless the custom is excluded by express words."

agreement,—and its construction is for the court, and not for the jury, —it seems to me to be simply an agreement for a yearly hiring at a yearly salary; and that there is nothing in the proviso to alter the nature and character of the agreement: it is a mere statement that the defendant will at the end of the year, if he shall see fit, make the plaintiff a present of 30*l.* It is clear that this 30*l.* could not have been recovered by action, if the service had lasted until the *end of the year. The simple question is, whether, looking at the custom [*355 proved, which is general, there is anything in the written agreement to exclude it. I see nothing in it that can have that effect. The proviso cannot exclude it: that has no reference to dismissal. Then, if there is nothing in the contract that is inconsistent with the application of the general custom, it is the same as if the custom had formed part of the written agreement. This case must follow the ordinary rule, that, wherever a contract is made in a particular trade, all customs which regulate that trade are tacitly incorporated into the contract, unless by express terms excluded. There was nothing to warrant the conclusion of the jury; and consequently the rule will be made absolute, not, however, to enter a verdict for the defendant, no leave having been reserved, but for a new trial.

WILLES, J.—I am entirely of the same opinion. The fact of the plaintiff having been engaged at a yearly salary under an agreement which has been reduced into writing, is clearly not enough to exclude the custom, which was proved to be general, to determine a yearly hiring by giving a month's notice,—just as in the case of domestic servants, where, though a general hiring is presumed to be a hiring for a year, the service may nevertheless be put an end to at any time by a month's notice. The question is whether the application of that general custom to the particular case is excluded by the concluding words of the agreement, which provide, that, at the end of the year, if the employer is satisfied with the amount of business done, he will make an addition of 30*l.* to the stipulated salary. Would that proviso be inconsistent with the agreement going on to say that the master should still be at liberty, if so minded, to dismiss the servant at *any time during the year, [*356 upon giving him a month's notice? Clearly not. The custom, being proved, becomes part and parcel of the contract. The jury had no right to take upon themselves to say that the special contract excluded the custom. The evidence upon which that conclusion was founded does not in fact negative the application of the custom to a hiring under a contract like this. The witness merely stated that he did not know of an instance where under such an agreement as the present the custom had been acted upon.

BYLES, J.—In cases of this nature, two questions generally arise,— the one, a question of law, whether the terms of the agreement may admit or must necessarily exclude the custom,—the other, one of fact, whether, if the agreement may admit the custom, the custom extends to the particular agreement. I do not therefore see that the learned judge was wrong in leaving this latter question to the jury. The evidence of the custom was irresistibly strong; and, although the jury might, upon proper evidence, have found a limited custom, there was no evidence of any such limitation here. Rule absolute for a new trial.

*357] *SMITH v. GLASSCOCK. *April* 20.

The admittance of tenant for life upon a surrender to the use of the will, enures as the admittance of those in remainder, so as to vest the estate in them.

A testator devised copyhold land to his widow for life, remainder to his six children, three sons and three daughters, in equal shares, as tenants in common. After his death, his widow was duly admitted. The widow died, and two of the daughters also died unmarried and intestate: but there was no evidence as to the third daughter. One of the sons went abroad, and never was heard of. The second was proved to be alive. The third, in 1843 (his mother and two sisters being then dead), got himself admitted in respect of three-sixths of the land; and in 1845, in default of claim by the other remainder-men, after proclamation, got admitted to the rest as heir-at-law of the person last seised. In 1850, he covenanted to surrender five-sixths of the land to the plaintiff, and the plaintiff was thereupon admitted by the lord:—Held, that the plaintiff thereby obtained no title to more than four-sixths,—even as against one having no title, but a bare possession.

THIS was an action of ejectment in which the plaintiff sought to recover five-sixths of a garden at Harlow, in the county of Essex.

The cause was tried before Williams, J., at the last Assizes at Chelmsford, when the following facts appeared in evidence:—The property in question, which was copyhold, had formerly belonged to one John Faulder, who by his will, dated in March, 1812, devised it to his widow for life, with remainder to his six children, John (who was illegitimate), Thomas, Jane, Elizabeth, Mary, and Joseph, in equal shares, as tenants in common. John Faulder died shortly after the date of his will, and his widow was duly admitted tenant on the roll. She afterwards died. Mary and Jane, two of the daughters of the testator, also died, unmarried and intestate. John, the eldest son, went abroad, and had never since been heard of; and there was some evidence that Elizabeth died on her way out to Calcutta. On the 16th of June, 1843,—the widow of the testator and the two daughters Mary and Jane being dead, and Elizabeth having disappeared,—Thomas Faulder was admitted to his one-sixth share, and to the shares of Mary and Jane as heir-at-law, and thus became entitled to three-sixths. On the 20th of June, 1845, proclamation was made in the lord's court, and, neither of the other remainder-men having claimed to be admitted, Thomas Faulder appeared
*358] and was admitted to the *remaining three-sixths, as heir-at-law of the testator; and down to the time of the trial no other claimant had appeared. In August, 1850, Thomas Faulder covenanted to surrender five-sixths of the property to the plaintiff; and on the 4th of July in that year, the plaintiff was admitted tenant in respect of five-sixths.

The defendant did not pretend that he came in otherwise than as tenant to John Faulder, the testator: and it appeared that he had paid him rent for several years; but that, after the death of the testator, he declined to pay rent, in consequence of the disputes which arose between the children on account of the illegitimacy of the eldest son, John.

The learned judge ruled, that, inasmuch as there was no evidence of Joseph's death, the plaintiff had made out no title to recover in respect of his one-sixth share; and he directed a verdict to be entered for the plaintiff for four-sixths, reserving leave to the plaintiff to move to enter it for the other sixth, if the court should be of opinion that he was entitled to do so.

Hawkins now moved accordingly.—As against Joseph, the lord could

only seize quousque for default of his appearance on proclamation: but, as against all the rest of the world, the admittance of the plaintiff would be an absolute title. [BYLES, J.—Suppose Joseph came now and claimed to be admitted, what answer would the present plaintiff have to an ejectment by him?] None. [CROWDER, J.—The plaintiff claims title to five-sixths under a person who at the most legally possessed only four-sixths.] Doe d. Le Keux *v.* Harrison, 6 Q. B. 631 (E. C. L. R. vol. 51), seems to be precisely in point. There, the heir of copyhold lands not appearing on proclamation, the lord seized quousque. Afterwards, the heir claimed; *and, the lord declining to admit him, on the supposition that another party had title, the heir obtained a rule [*359 nisi for a mandamus to compel his admittance. Upon the discussion of that rule, the court, by consent of the heir and the lord (no other party appearing), directed that an ejectment should be brought to try the right. On the trial, the heir proved title; and the defendant (the lord) put in a will of the ancestor, devising the lands to the London Annuity Society. No further evidence being given for the defendant, the judge left the case to the jury on the proof of title in the lessor of the plaintiff (the heir): and he had a verdict. Upon a motion to enter a nonsuit, it was held that the plaintiff was entitled to recover; for, that the lord, though he had seized quousque, could not hold against the heir, on the mere proof of a devise to parties who had not claimed admittance, and of whom nothing was known. Coleridge, J., there says: "The seizure quousque makes no difference in the right of the heir. The lord seizes only till the tenant comes in. That seizure does not give him any adverse title." [WILLIAMS, J.—How do you make out a title to Joseph's share?] Until June, 1845, there was no tenant on the roll. Proclamations were then made in the ordinary way: and, no one coming in, the heir-at-law of the person last seised makes claim and is admitted. The plaintiff, who claims through him, though he may have no title as against Joseph, has a perfectly good title as against all the rest of the world. [WILLIAMS, J.—Admittance is not conclusive of title: two claiming by different titles may be admitted: Rex *v.* The Lord of the Manor of Hexham, 5 Ad. & E. 559 (E. C. L. R. vol. 31), 1 N. & P. 53. There must have been a surrender to the use of John Faulder's will. The admittance of the tenant for life would be the admittance of all in *remainder under the will.(*a*)] This is not a question as between [*360 Thomas, the heir-at-law, and Joseph: but as between a tenant duly admitted on the roll and a wrongdoer, a mere trespasser on the estate. The recovery against him would not in any degree affect Joseph's right.

WILLIAMS, J.—I am of opinion that there ought to be no rule in this case. It appeared at the trial that the testator, John Faulder, devised the property in question to his widow for life, remainder to his six

(*a*) In Scriven on Copyholds, 4th edit. 294, it is said: "It has long been settled that the admittance of the tenant for life or years is the admittance of all in remainder, so as to vest the estate in them;" referring to Brown's Case, 4 Co. Rep. 22 b, where it was resolved that "the admittance of a tenant for life is the admittance of him in remainder to vest the estate in him, but shall not bar the lord of his fine, which he ought to have by the custom." And see Rex *v.* Wilson, 10 B. & C. 80 (E. C. L. R. vol. 21), 5 M. & R. 140, where it was held that the lord of a manor is bound to admit the customary heir of a copyholder in fee, although there be a surrender to the use of the will, and a devise by the surrenderor, there being no claim of admittance on the part of the devisee.

children, John, Thomas, Jane, Elizabeth, Mary, and Joseph, in equal shares, as tenants in common; that, there being a surrender to the use of the will, the widow was duly admitted tenant on the roll; and that the testator's son Joseph, in respect of whose one-sixth the verdict is sought by this rule to be entered, is still alive. Now, it is a rule of copyhold law, that the admittance of the tenant for life is the admittance of all those in remainder. In short, it is an admittance to the whole estate. The question is, whether the plaintiff has made out his title to recover this one-sixth, when it is shown to be outstanding in a person who is living. He founds his right to recover upon the fact of his having *been admitted tenant on the roll. But his admittance as tenant on the roll cannot give him a title as against one who has already been admitted by the admittance of his mother, the tenant for life. We have been much pressed with the case of Doe d. Le Keux *v.* Harrison, 6 Q. B. 631 (E. C. L. R. vol. 51). That, however, is a totally different case. There, the lord, who had seized quousque, attempted to set up, in answer to the claim of the heir, a devise by the ancestor, under which the devisee had never claimed to be admitted. It was objected on the part of the plaintiff, that the will alone, without any proof of the devisee having been admitted, amounted to nothing. And of that opinion was Parke, B., whose ruling was upheld by the court. The difference between the two cases is manifest: there, there was nobody who was clothed with the legal estate under the devise; here, the devisee in remainder is in by the admittance of the tenant for life. I therefore think the plaintiff has failed to make out his title to recover more than the four-sixths for which the verdict was taken.

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CROWDER, J.—I am of the same opinion. The plaintiff made out his title to four-sixths; but, as to the one-sixth in respect of which he now seeks to enter the verdict, he has altogether failed. He founds his claim upon the fact of the property having been transmitted to him through a person who has been admitted tenant of the whole property. That, however, gives him no title. The admittance of Mrs. Faulder, the widow, was in law an admittance of all those who were entitled in remainder,—of the son Joseph amongst the rest. Doe d. Le Keux *v.* Harrison, for the reasons stated by my Brother Williams, has no application. It is said that the admittance of Thomas Faulder, under whom the plaintiff claims, at all events entitles him to recover against a mere trespasser. But the defendant is no trespasser: *he can only be removed from the one-sixth by proof that the plaintiff is the rightful owner of it. That the plaintiff has failed to make out.

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BYLES, J., concurred.(*a*) Rule refused.

(*a*) Cockburn, C. J., was ill, and Willes, J., sitting at Nisi Prius.

THE YORKSHIRE TIRE AND AXLE COMPANY, Appellants; THE ROTHERHAM LOCAL BOARD OF HEALTH, Respondents. *April* 21.

An application to send back for amendment a case on appeal from justices under the 20 & 21 Vict. c. 43, s. 2, may be entertained before the day of argument.

A CASE having been stated by justices, under the statute 20 & 21 Vict. c. 43, s. 2,

Garth, on a former day, moved, on behalf of the appellants, that it might be sent back for amendment.(*a*)—The application before the justices was for penalties for continuing a certain drain after notice from the board. The question was whether what was done had not been done with the consent of the board. The justices refused to convict. It was suggested that material omissions had been made in the case as stated,—that a certain notice which had been given by the *company to the local board of health in 1854, and an order made by the board in June, 1855, in answer to the company's [*363 application for permission to put a blow-off pipe into the sewer, and also a plan of the locus in quo,—all of which had been before the justices, and acted upon by them,—were altogether omitted.

Manisty, Q. C., contrà, submitted that this was not the proper time to make the application; but that the case must be argued before the court could see whether or not any amendment was required: and he referred to a case of Christie, app., The Guardians of St. Luke, Chelsea, resp., 27 Law Journ., M. C. 153, where the Court of Queen's Bench refused to entertain such a motion before argument. As to the plan, he stated, that, if that was used before the justices, there could be no difficulty as to its being used here. [BYLES, J.—I see nothing in the act to take away the ordinary jurisdiction of the court as to amending special cases.(*b*) WILLES, J.—The omission of the notice and order seems to have been a mere slip.] We do not admit that the order was produced before the justices.

WILLES, J.—That being the case, the better course will be for Mr. *Garth* to renew his application, upon affidavit; and we will deal with the costs when the matter comes properly before us.

Garth now renewed his motion, upon an affidavit which distinctly alleged that the order had been produced and acted upon by the justices.

Manisty, for the respondents, prayed for time to answer the affidavit: which was granted.

*On a subsequent day, *Manisty* intimated that he did not intend to file any affidavit in answer: and it was agreed that the [*364 case should go back for amendment,—each party to be at liberty to submit to the justices any additions which they might think ought to be made. Rule accordingly.

(*a*) Under s. 7, which enacts that "the court for the opinion of which a case is stated shall have power, if they think fit, to cause the case to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall be amended."

(*b*) See Hills *v.* Hunt, 15 C. B. 30 (E. C. L. R. vol. 80).

PUGH and Others v. STRINGFIELD and Another. *April* 23.

W. F. covenanted with A., B., and C., to whom he had severally mortgaged certain unfinished messuages, to complete the premises by a given day; and A., B., and C. severally covenanted with W. F. to make him certain periodical advances. In consideration of the arrangement thus entered into with W. F., D. and E. jointly and severally guarantied to A., B., and C., that W. F. should duly perform his covenant with them,—their joint and several liability under the guarantee not to exceed 100*l.* Default having been made by W. F.,—Held, that A., B., and C. might recover to the extent of the 100*l.* in a joint action against D. and E., in respect of damages sustained by them, or either of them, from W. F.'s breach of covenant.

THIS was an action upon a guarantee. The declaration stated, that, before the making by the defendants of the promise thereinafter mentioned, the plaintiffs had respectively advanced to one William Few several sums of money upon several indentures by way of mortgage of certain messuages or tenements situate at Kentish Town and Camden Town, in the county of Middlesex; and certain arrangements had been entered into between the plaintiffs and other parties with the said William Few touching their said several mortgages and properties, and which arrangements were expressed, contained, or referred to in an indenture which had at the time of the making by the defendants of their promises thereinafter mentioned, been prepared, and which said indenture was and is made between the said William Few of the first part, the plaintiff Charles Pugh of the second part, the plaintiff Robert Dobbing of the third part, and the plaintiff James Gardner of the fourth part, and Edward Moss Dimmock and *Richard Burby of the fifth part, whereby, after reciting as therein is recited, the said William Few covenanted with the plaintiffs that he would on or before the 10th day of January, 1857, complete and finish, to the satisfaction of such surveyor for the time being who might be jointly appointed by the plaintiffs, and pursuant to and in accordance with the plans, specifications, and conditions then already prepared by Mr. George Low, the surveyor at that present time acting on behalf of the plaintiffs, and signed by the said William Few, the said several messuages or tenements situate and being at Kentish Town and Camden Town aforesaid, and comprised in the said several indentures of mortgage, including the making of all roads and pavements, and laying out gardens to the extent of making paths therein, and upon the terms and subject to the conditions therein contained: That by the said indenture the plaintiffs covenanted and agreed with the said William Few that they would advance to him, for the purpose of enabling him to complete and finish the said messuages or tenements and premises, the sum of 1557*l.*, such sum to be advanced, as the work should proceed, in weekly payments, upon the certificates of the said surveyor, and each of such certificates to be applicable to the work done towards the completion and finishing of the said messuages or tenements and premises during the seven days next preceding the date thereof: Averment, that, the said indenture having been so prepared, the defendants, in consideration of the said arrangements so entered into by the plaintiffs with the said William Few, and that the plaintiffs would covenant to advance to the said William Few, for the purpose of enabling him to complete and finish the said messuages or tenements according to the said plan, specification, and conditions so already prepared, and signed by the said William Few, and which

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*covenant and agreement were and are respectively contained in the said indenture, guarantied and agreed with the plaintiffs that [*366 the said William Few should duly and properly perform and fulfil the said covenant so entered into by him with the plaintiffs, and contained in the said indenture, for the completion and finishing, upon the terms and subject to the conditions therein mentioned, of the several messuages or tenements mentioned or comprised in the several indentures of mortgage in the said thereinbefore-mentioned indenture of even date therewith mentioned; it being, nevertheless, agreed and declared that the defendants' joint and separate liability under or by virtue of the said guarantee or agreement should not exceed the sum of 100*l.*: Breach, that, although all things had happened and been done, and all times had elapsed reasonable and necessary to entitle the plaintiffs to have the said covenant and agreement performed by the said William Few, and also to have the defendants' said guarantee and agreement performed by them; yet the said William Few had wholly neglected and failed to perform his said covenant so entered into by him with the plaintiffs, and contained in the said indenture, for the completion and finishing the said messuages or tenements, and the plaintiffs had thereby sustained damages to a greater amount than the sum of 100*l.*, and although all things had been done and happened, and all times had elapsed reasonable and necessary to entitle the plaintiffs to have and recover of and from the defendants the said sum of 100*l.*, yet the same had not been paid to the said plaintiffs: And the plaintiffs claimed 100*l.*

The defendants pleaded, to the first breach, that the said William Few did not neglect and fail to perform his said covenant so entered into by him with the plaintiffs, contained in the said indenture, for the *completion and finishing of the said several messuages or tenements situate and being at Kentish Town and Camden Town as [*367 in the said declaration alleged, nor had the plaintiffs thereby sustained any damages.

Upon this plea the plaintiffs joined issue.

The cause was tried before Willes, J., at the first sitting at Westminster in this term. The guarantee and the deed therein referred to were put in. The guarantee (which was addressed to the plaintiffs) was as follows:—

"London, 24th of October, 1856.

"Gentlemen,—In consideration of the arrangements entered into by you with Mr. William Few, of, &c., builder, and of your covenanting to advance to him, for the purpose of enabling him to complete and finish certain messuages or tenements situate at Kentish Town and Camden Town, Middlesex, according to the plan, specification, and conditions already prepared, and signed by the said William Few, and which covenant and agreement are respectively contained in a certain indenture of even date herewith, made between the said William Few of the first part, Charles Pugh of the second part, Robert Dobbing of the third part, James Gardner of the fourth part, and E. M. Dimmock and R. Burby of the fifth part, we the undersigned, William Stringfield and John Groves Cooper, of, &c., do hereby jointly and severally guaranty and agree that the said William Few shall duly and properly perform and fulfil the covenant entered into by him with you, and contained in the said indenture of even date herewith, for the completion and finishing,

upon the terms and subject to the conditions therein mentioned, of the several messuages or tenements mentioned or comprised in the several indentures of mortgage in the said indenture of even date herewith mentioned; it being, nevertheless, agreed and declared that our joint
*368] and separate liability under or by virtue of this *guarantee or agreement shall not exceed the sum of 100*l.*

(Signed) "JOHN W. STRINGFIELD.
"J. GROVES COOPER."

It was proved that William Few had failed to perform his covenant for the completion of the messuages referred to in the deed, and that each of the three plaintiffs had thereby sustained damage exceeding 100*l.* But it was insisted on the part of the defendants that no joint damage had been sustained by the three plaintiffs, so as to entitle them to maintain the action, or, at all events, for more than nominal damages.

A verdict was taken for the plaintiffs, for 100*l.*, leave being reserved to the defendant to move to enter a verdict for him on the above-mentioned issue, or to reduce the damages to 1*s.*, if the court should be of opinion that the defendants' contention was well founded.

Atherton, Q. C. (with whom was *W. Brandt*), now moved accordingly.—This is in substance a contract of indemnity; and, unless it be shown that the plaintiffs have sustained a joint damnification, they cannot recover, or, at all events, not beyond nominal damages. The breach of covenant complained of is in respect of the non-completion of the three several sets of premises, the interests of the plaintiffs in which are entirely separate and distinct. The court has already decided,—3 C. B. N. S. 2 (E. C. L. R. vol. 91),—that the interests of the three plaintiffs in this contract is joint: but they cannot recover unless they show a joint damage. Here, there is no possibility of a common damage to the three. [CROWDER, J.—Your argument would render the guarantee altogether nugatory.] It may be that the parties would have a remedy in equity. [WILLES, J.—That would be on the ground that each of the
*369] *plaintiffs was a trustee for the others. Lamb *v.* Vice, 6 M. & W. 467,† shows that a trustee may maintain an action upon an indemnity for his cestui que trust.] The difficulty here is that each of the covenantees sustains a separate damage, and in different proportions.

CROWDER, J.—I am of opinion that there should be no rule. The court having already decided that one of the plaintiffs could not sue upon this guarantee alone, the interests of the three therein being joint, it seems to me to follow that the three may jointly maintain an action upon it: and I think it would be making the whole contract senseless, to hold that nominal damages only can be recovered for the breach. The plain meaning of the guarantee is, that, if damages result to the plaintiffs or either of them from Few's breach of covenant, the defendants are to be liable to the extent of 100*l.* The 100*l.* being recovered, the plaintiffs will hold it in trust to be applied in proportion to the extent of damage sustained by each. But the defendants have nothing to do with its application.

WILLES, J.—Having been a party to the former decision of the court upon this guarantee, it does not become me to say anything about it. I will only observe, that, if each of the plaintiffs might maintain a separate action, the first, on proof of damage resulting to him beyond that amount, might recover the whole 100*l.*, and leave the others in the lurch:

whereas, if they join in suing, each will recover the proportion he may be entitled to. If the guarantee had been given to one having no interest in the subject-matter, but who was merely a trustee for third persons, he might well have sued upon it. That is clear from the class of cases of which the case I referred to is one. There, an officer *of the Palace court entered into a bond, with sureties, to the knight marshal of that court, conditioned for the due performance of the duties of his office; and (inter alia) that he should take sufficient bail from all defendants arrested, and should obey the lawful orders of the court. Having taken insufficient bail from a defendant arrested in an action in that court, an order was made requiring him to pay the amount of debt and costs in the action, which he disobeyed: and it was held that the knight marshal was entitled, as a trustee for the plaintiff in the action, to recover, in an action on the bond, the full amount of the debt and costs. If, then, one having no interest may sue as trustee, there can be no reason why the parties interested may not sue in the same way. I therefore agree with my Brother Crowder in thinking that there should be no rule. [*370

BYLES, J.—I am entirely of the same opinion. As between the plaintiffs and the defendants, the damages to be recovered under this instrument must be joint; but, as between the plaintiffs themselves, the interest in the fund when recovered is several. The three plaintiffs jointly are trustees for each other severally. Any other construction would render this guarantee altogether nugatory. We are, in effect asked to reverse the maxim "Interpretatio fienda est, ut res magis valeat quàm pereat." Rule refused.

See this case, ante 3 Comm. Bench N. S. (E. C. L. R. vol. 91), 2, and note.

*HART v. MILES. *April* 23. [*371

The declaration stated, that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange (describing them), and to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised the plaintiff, that, if he should succeed in procuring the bills or either of them to be discounted, he would apply the proceeds in a given way: averment that the defendant did succeed in procuring the bills to be discounted, but that he failed to apply the proceeds as agreed:—Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration for the defendant's promise.

THE first count of the declaration stated that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange, one for 25*l.*, and the other for 24*l.* 10*s.* 6*d.*, each drawn by the defendant upon and accepted by the plaintiff, and payable to the defendant's order, and to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised the plaintiff that, if he should succeed in procuring the said bills or either of them to be discounted, he would pay to Messrs. Sotheron & Richardson the proceeds of such discounting, or a sufficient part thereof, in discharge of another bill of exchange for 45*l.* 5*s.* 10*d.*, or of so much thereof as such proceeds would satisfy; and

the defendant succeeded in procuring the said first-mentioned bills to be discounted, and the plaintiff did all things necessary to have the defendant perform his said promise, and a reasonable time for the defendant so to do elapsed; yet the defendant broke his said promise, in this, that he did not pay the proceeds, or any part thereof, to the said Messrs. Sotheron & Richardson, in discharge of the said bill of exchange for 45*l.* 5*s.* 10*d.* or any part thereof; by reason whereof the said Messrs. Sotheron & Richardson obtained judgment in an action at law against the plaintiff for the amount of the last-mentioned bill, and damages and costs, amounting to a large sum, to wit, 51*l.* 4*s.* 2*d.*, and issued execution thereon, and caused the plaintiff's goods to be seized and sold in satisfaction of the said judgment, and of the poundage, costs, and expenses of the said execution, amounting in the whole to a large sum, to wit, 64*l.* 2*s.* 10*d.*, and of certain arrears of rent; *and by reason thereof, the goods of the plaintiff to a much greater value than the amount of those moneys, were sold under the said execution, for the purpose of raising the said moneys; and thereby the plaintiff was greatly injured in his expectations, and ruined in his business and circumstances, and greatly harassed and impoverished; and by reason thereof also the plaintiff became liable to pay the two first-mentioned bills, and may have to pay the same, and was put to costs and charges in and about endeavouring to procure the holder of those bills not to sue the plaintiff thereon.

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The defendant pleaded, amongst other pleas,—secondly, that he did not succeed in procuring the said bills to be discounted, as alleged. Issue thereon.

The cause was tried before Williams, J., at the sittings in London after last term. It appeared that the defendant received the two bills on the 30th of June, 1857, and paid them in to his account at his bankers', where they were entered short, but that, shortly afterwards, he obtained an advance from the bankers, upon an understanding that any bills in their hands belonging to him might be discounted. The execution took place on the 7th of August: and the bills became due in September.

On the part of the defendant, it was submitted that this was a mere naked bailment, and that the defendant was acting as agent for Messrs. Sotheron & Richardson.

The learned judge left it to the jury to say whether the defendant made the agreement upon his own responsibility, whether he did succeed in getting the bills discounted, and whether he knew of the discount before the date of the execution,—telling them, that, if he did know of the discount before that event, there was an end of the case, except as to damages; but that if he did not, he would not be liable.

*373] *The jury returned a verdict for the plaintiff,—damages, 75*l.*

Wordsworth, Q. C., now moved for a new trial on the grounds of misdirection, and that the verdict was against evidence; and also in arrest of judgment as to the first count. He submitted that the question of agency ought to have been more pointedly put to the jury, and that they should have been told that the defendant was not responsible for the accidental passing of the bills to his debit by his bankers without his authority. As to the arrest of judgment, he contended that the count disclosed no consideration whatever for the defendant's promise;

and that, and at the utmost, it disclosed a mere bailment, without reward. [WILLES, J.—If there be any consideration, we cannot inquire into the adequacy of it: Haigh *v.* Brooks, 10 Ad. & E. 409, 4 P. & D. 288.]

CROWDER, J.—I am of opinion that there is no ground for arresting the judgment in this case. Looking at the whole declaration, though it certainly is somewhat vague, I think it may be supported, and that the consideration stated is sufficient. The statement is that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange (describing them), to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised, &c. It is clear that the bills were the plaintiff's property, and that he was entitled to the possession of them: and it is equally clear that they were in the possession of the defendant without value. Instead of requiring him to give them up, the plaintiff consents that the defendant shall retain them for a given purpose, viz., to get them discounted. That is a sufficient consideration for the defendant's promise to dispose of *the proceeds in the manner agreed upon, if he succeeded in getting the bills discounted. If [*374 the defendant had not made the promise he did, the plaintiff might have handed the bills over to somebody else for the purpose of procuring them to be discounted. I think the consideration was sufficient to support the promise. As to the alleged misdirection,—I am at a loss to discover in what it consisted. It is said that the learned judge should have told the jury that the defendant got no benefit from the transaction; and, further, that he had been pressed with an argument that the case was one of agency only,—that the defendant was acting merely as agent for Sotheron & Richardson,—and that that should have been put to the jury. The learned judge did ask the jury whether the defendant made the agreement upon his own responsibility. That was in effect putting the question of agency to them. The defendant clearly did not make the promise as agent: it was an original undertaking. I see no ground therefore for granting a rule upon this point. But, with regard to the evidence, we will speak to the learned judge.

WILLES, J.—I agree with my Brother Crowder that there was no misdirection. As to the arrest of judgment, I also agree with him in thinking that the declaration discloses a sufficient consideration for the defendant's promise. If the pleader had reflected a little, he would probably have stated it thus,—in consideration of the plaintiff's consenting to the defendant's retaining possession of the bills, and getting the same discounted if he could, the defendant promised, &c. I rather think he was considering how the promise would have looked had it been gathered from a correspondence between the parties. If the defendant had written to the plaintiff thus,—"In consideration of your consenting to my retaining the bills in my *possession, I undertake, if I [*375 succeed in procuring them to be discounted, to hand over the proceeds to you;" and the plaintiff had answered,—"I assent to the terms of your letter;" there would have been a contract between them that the defendant should procure the bills to be discounted if he could, and hand over the proceeds. That is the contract which is to be implied here. It is do ut facias, or facio ut facias. That brings me to my last observation: if this be not a sufficient consideration, the defendant

might have procured the bills to be discounted without being compellable to hand over the proceeds. Assuming that there was no consideration in the first instance, the fact of the defendant's getting the money in the end makes him liable: just as a man who gives a guarantee for goods to be supplied to a third person incurs no liability until the goods are supplied,—the contract being until then entirely unilateral.

BYLES, J.—I am of the same opinion. The true meaning of the declaration I conceive to be this, that the plaintiff intrusts or continues to intrust the two bills, which are his property, to the defendant upon certain terms. I think, for the reasons given by my Brother Willes, that was a good consideration moving from the plaintiff for the defendant's promise to hand over the proceeds if he succeeded in getting the bills discounted. And, further, as my Brother Crowder observes, if the defendant had not retained the bills, the plaintiff might have got them discounted elsewhere. The loss of that opportunity was a detriment to the plaintiff, which would be of itself a sufficient consideration. Further, the declaration alleges that the defendant afterwards succeeded in getting the bills discounted, but failed to pay over the proceeds. There is, therefore, a good consideration for the defendant's promise at least in three ways.

*376] *CROWDER, J., on a subsequent day, intimated that he had conferred with Cresswell, J., and that the court saw no ground for disturbing the verdict upon the evidence. Rule refused.

Any benefit or advantage to a promissor, or disadvantage to the other party, however slight, is a sufficient consideration for a promise: Powell *v.* Brown, 3 Johnson 300; Townley *v.* Sumroth, 2 Peters 182; Underhill *v.* Gibson, 2 New Hampshire 352; M'Cullough *v.* Cowher, 5 Watts & Sergeant 427; Foster *v.* Fuller, 6 Massachusetts 58; Tomkins *v.* Phillips, 12 Georgia 52; Harlan *v.* Harlan, 20 Pennsylvania State 303; Clarke *v.* Sigourney, 17 Connecticut 511. The mere acquiescence in the continuance of an existing state of things, will be enough. Thus in Spangler *v.* Springer, 22 Pennsylvania State R. 458, by a sealed instrument the plaintiff agreed to manage a coal business, and the defendant agreed to compensate him in proportion to the business done; the agreement to continue for three years, but to be terminable at any time by either party on reasonable notice to the other. Subsequently, by a parol agreement, signed by the defendant alone, it was agreed that, if the compensation fell short of $1500 in any year, the defendant should make it up at the end of the year. It was held that the forbearance of the plaintiff to exercise his right to terminate the former agreement was a sufficient consideration to support the latter. In general, a gratuitous bailment of personal property, will be a sufficient consideration to support a promise to return: Clark *v.* Gaylord, 24 Connecticut 484. Therefore, in Rutgers *v.* Lucet, 2 Johnson's Cases 92, a somewhat similar case to that in the text, where A. received of B. a bill of exchange drawn by C., and which he promised to return to B. or pay the amount thereof, but the bill was thus received by A. as a mere matter of courtesy, and was to be used entirely for the benefit of B., it was held that A. was liable in assumpsit for failing to return the bill, or its amount, on demand.

DENDY *v.* NICHOLL. *April* 30.

A right of re-entry for breach of a covenant in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach, with knowledge of its existence.

EJECTMENT for a piece of meadow land in the parish of Hendon, in the county of Middlesex. The writ was dated the 16th of May, 1857.

The cause came on for trial before Cockburn, C. J., at the sittings in Middlesex after last Michaelmas Term, when a verdict was (by consent) taken for the plaintiff, upon the following admitted state of facts,—from which the court were to be at liberty to draw such inferences as a jury would be warranted in drawing; leave being reserved to the defendant to move to enter the verdict for him, if the court should be of opinion that those facts showed a waiver by the plaintiff of his right of re-entry:—

The defendant held the land in question as tenant to the plaintiff under a lease dated the 30th of November, 1838, for twenty-one years from Michaelmas then last, at the yearly rent of 3*l.* The lease contained the following covenant:—"That [*the lessee*], his executors or administrators, shall not at any time during the said term hereby granted, demise, grant, set, or let, or underlet the said hereby demised premises, or any part thereof, nor part with this indenture of lease (except by will), for all or any part of the said term, to any person or persons whomsoever, without the special *license in writing of the said [*377
[*lessor*], his heirs or assigns, first had and obtained." Proviso, "that, if the said yearly rent of 3*l.*, or any part thereof, shall be behind or unpaid by the space of twenty-one days next after the same shall become payable, or if the said [*lessee*] do not well and truly perform and keep all and every the covenants and agreements hereinbefore expressed, and which on his or their part are or ought to be performed and kept, and that according to the true intent and meaning of these presents, then and from thenceforth, or at any time or times hereafter, it shall and may be lawful for the said plaintiff, his heirs or assigns, into and upon the said premises hereby demised, or any part thereof, to re-enter, and the same to have again, retain, repossess, and enjoy as in his and their first and former estate, anything hereinbefore contained to the contrary thereof notwithstanding: nevertheless, this present demise shall be in force for the purpose of compelling a due performance of the covenants hereinbefore contained, and not then duly performed."

The defendant entered under this lease, and occupied up to Michaelmas, 1854, when he underlet the demised premises by parol to one Frend, who entered and continued in occupation from that time under an arrangement with the defendant to pay the rent half-yearly to the plaintiff. *The fact that the premises were so let was known to the plaintiff shortly after the letting took place;* but he did not know the terms as to the rent. After the letting to Frend, neither he nor the defendant paid any rent to the plaintiff up to the 30th of April, 1857. On that day, the plaintiff issued a writ for the recovery of the rent due on the 25th of March preceding. On the 16th of May, the cause was by a judge's order referred to the master, and the defendant, on the 23d, paid the plaintiff's attorney the amount of the rent so due.

*On the 16th of May, 1857, this action was commenced; the [*378
breaches of covenant in respect of which it was brought were

stated in the particulars to be,—first, the non-payment of rent accrued due subsequently to Michaelmas, 1854,—secondly, the assignment, underletting, and demise of the premises, and parting with the indenture of lease, contrary to the covenant in that behalf.

Hugh Hill, Q. C., accordingly, in Hilary Term last, obtained a rule nisi to enter a verdict for the defendant, on the ground that the facts admitted at the trial showed that the plaintiff had waived his right of re-entry.

Kinglake, Serjt., and *H. Lloyd*, now showed cause.—The question is, whether the acceptance of rent from the lessee on the 23d of May, 1857, was a waiver of the forfeiture accruing from the unauthorized underletting at Michaelmas, 1854, of which forfeiture the landlord had elected to avail himself by having previously commenced an action of ejectment on the 16th. In the notes to Dumpor's Case (4 Co. Rep. 119), in 1 Smith's Leading cases, 4th edit. 33, it is said: "It is conceived that the mere receipt of subsequent rent does not, of its own proper force, operate as a waiver of the forfeiture. It is only evidence of the election of the lessor to retain the reversion and its incidents, instead of the possession of the land; and, as an election once made and expressed cannot be retracted (quod semel placuit in electionibus amplius displicere non potest: Co. Litt. 146, a) the receipt of subsequent rent, as such, without more, binds the landlord by proving an election. But rent to the amount of that reserved in the lease may be received under circumstances showing it to be paid and accepted merely as compensation for use of *379] *the land, and not with the intention of setting up the lease; nay, a contrary intention may be expressed at the time of its receipt. A receipt of rent under such circumstances would not, it seems, amount to a waiver of the forfeiture: see Doe v. Batten, Cowp. 243. It is not supposed that the naked question of intention to waive would in such a case be left to the jury. The question should perhaps be,—Did the lessor receive the rent eo nomine as rent due under the lease? See per Parke, J., Doe d. Griffith v. Pritchard, 5 B. & Ad. 765, 776 (E. C. L. R. vol. 27). A receipt of rent after the lessor has by some unequivocal act, such as bringing ejectment, expressed his election to treat the lease as void, cannot operate to revive it: Jones v. Carter, 15 M. & W. 718.† See Co. Litt. 215 a." [WILLES, J.—All that is now exploded. CROWDER, J.—The Court of Queen's Bench, in Croft v. Lumley, 5 Ellis & B. 648 (E. C. L. R. vol. 85), decided that the receipt of rent, as a matter of law, operated to waive all forfeitures then known to the lessor, and that no protest on his part could prevent this legal effect. The Exchequer Chamber affirmed the judgment in that case, but upon another point. The case afterwards went to the House of Lords, with a like result: see 6 House of Lords Cases 672.(a)] In Jones v. Carter, 15 M. & W. 718,† it was held that the service by a lessor upon the lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; and he cannot afterwards (although there has not been any judgment in the ejectment) sue for rent due or covenants broken after the service of the declaration. Parke, B., in giving judgment, there says:

(a) As to the question of waiver, see the opinions of Bramwell, B., p. 705, of Crompton, J., p. 713, of Martin, B., p. 720, of Williams, J., p. 725, of Wightman, J., p. 729, and of Coleridge, J., p. 733.

"Though the lease is *declared to be *void* for breach of covenant, [*380
it is perfectly well settled that the true construction of the pro-
viso is, that it shall be void *at the option* of the lessor: Rede *v.* Farr, 6 M. & Selw. 121, Doe d. Bryan *v.* Bancks, 4 B. & Ald. 401 (E. C. L. R. vol. 6), and other cases: and, consequently, on the one hand, if the lessor exercises the option that it shall continue, the lease is rendered valid; if he elect that it shall end, the lease must be determined. In the cases above referred to, the option was held to have been exercised by the receipt of rent subsequently due, and the lease thereby rendered valid. In like manner, the lease would be rendered invalid by some unequivocal act, indicating the intention of the lessor to avail himself of the option given to him, and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease; and, if once rendered *void*, it could not again be set up. An entry, or ejectment, in which an entry is admitted, would be necessary in the case of a freehold lease, or of a chattel interest, where the terms of the lease provided that it should be avoided by re-entry. Whether any other act unequivocally indicating the intention of the lessor would be sufficient to determine this lease, which is made *void* at the option of the lessor, we need not determine, because an ejectment was brought, and proceeded with to the consent-rule, by which the defendant admitted an entry, and the entry would certainly be an exercise of the option; and, once determined, the lease could not be revived. It was said there was no authority upon the point now under consideration; but there is a case at Nisi Prius materially bearing upon it, in which Lord Tenterden expressed a clear opinion that the receipt of rent after *an ejectment brought for a forfeiture* was no waiver of such forfeiture: Doe d. Morecraft *v.* Meux, 1 C. & P. 348 (E. C. L. R. vol. 12). A case was desired, but we cannot find that any was *argued. [*381
We entirely agree in Lord Tenterden's opinion. The precise
point that he decided was, that, on the trial of an ejectment for a forfeiture (in which, of course, the *entry* was admitted), the receipt of rent after the bringing of that ejectment was too late, and the lease was not rendered valid. We think the same consequence follows from an entry admitted by the consent-rule; but, even supposing no consent-rule to have been entered into, we think that the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once for all." The intention of the landlord to waive the right of re-entry or the forfeiture, must be evidenced by some unequivocal act which cannot be retracted: Doe d. Morecraft *v.* Meux, 4 B. & C. 606 (E. C. L. R. vol. 10), 7 D. & R. 98 (E. C. L. R. vol. 16); Doe d. The Baron de Rutzen *v.* Lewis, 5 Ad. & E. 277 (E. C. L. R. vol. 31), 6 N. & M. 764 (E. C. L. R. vol. 36). In both those cases the evidence of waiver was clear and distinct. [CROWDER, J.—Having treated the defendant as his tenant by suing him for the rent, can the plaintiff afterwards change his mind and elect to treat him as a trespasser?] In Blyth *v.* Dennett, 13 C. B. 178 (E. C. L. R. vol. 76), a *demand* of rent accruing subsequently to the expiration of a notice to quit, was held not necessarily to be a waiver of the notice. [CROWDER, J.—That is a totally different matter. It was necessary there to have the assent of both parties to create a new tenancy: Here,

all that is needed, is, the election of the landlord to discontinue the tenancy. In Comyns's Digest, *Condition* (P), it is said, that "if, after a condition broken annexed to an estate of freehold, and notice of it, the feoffor accept the rent due at a subsequent day, it shall be a dispensation of the forfeiture, for he allows the estate to have continuance: Co. Litt. 211 b; Harvey *v.* Oswald (Harvie *v.* Oswel), Cro. Eliz. 553, *382] *572. So, if a condition upon a lease for years be, for non-payment of rent to re-enter, the acceptance of rent at a subsequent day is a dispensation: Cro. Eliz. 553, 572." Unless there be some distinction between an assize of rent and the present mode of enforcing payment of rent by action, I do not see how that is to be answered.] In the course of the argument in Doe d. Nash *v.* Birch, 1 M. & W. 402, 406,† Parke, B., observes: "In Green's Case, Cro. Eliz. 3, calling the party a tenant in a receipt for bygone rent, was held to be sufficient evidence of a waiver; and that, though the receipt of the rent would not be a waiver, yet that the calling him tenant in the receipt was. You may say that a demand of rent is not a [waiver of a] forfeiture, because the landlord in effect says, 'If you will pay me the rent, I will accept you as a tenant,' and the tenant does not do so; therefore it is incomplete: some distinct act ought to be done to complete a waiver." [CROWDER, J.—I observe that the learned Baron, in giving judgment in that case, says,—"I think that an absolute unqualified demand of the rent by a person having sufficient authority, would have amounted to a waiver of the forfeiture, and it would have been like the case I cited from Croke's Reports."]

Hugh Hill, Q. C., and *Maude*, in support of the rule.—The simple question here is, whether the bringing an action for the rent, and afterwards by means of the action receiving the rent, was not a sufficient election by the lessor to affirm the continuance of the lease, so as to prevent him from afterwards turning round and treating the lessee as a trespasser. The particulars in the action show that the rent in respect of which it was brought accrued subsequently to the time the plaintiff had notice of the forfeiture. Doe d. Morecraft *v.* Meux, 4 B. & C. 606 (E. C. L. R. vol. 10), 7 D. & R. 98 (E. C. L. R. vol. 16), Doe d. The *383] Baron de *Rutzen *v.* Lewis, 4 Ad. & E. 277 (E. C. L. R. vol. 31), 2 N. & M. 764 (E. C. L. R. vol. 28), and Jones *v.* Carter, 15 M. & W. 718,† show that the intention of the landlord to waive the forfeiture must be evidenced by some unequivocal act. But here was an unequivocal act showing a clear election on the part of the plaintiff to treat the defendant as a continuing tenant. Littleton, § 219, says,—"If a man grant by his deed a rent-charge to another, and the rent is behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distreine for the rent behind, and the distress detaine until he be payd. But he cannot do or have both together, &c. For, if he recovers by writ of annuity, then the land is discharged of the distress, &c. And, if he doth not sue a writ of annuity, but distreine for the arrearages, and the tenant sueth his replevin, and then the grantee avow the taking of the distress in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity." Upon this Lord Coke observes,—Co. Litt. 145 a,—"Here is to be observed that this determination of the election of the grantee must be by action or suit in court

of record; for, albeit the grantee distreine for the rent, yet he may bring a writ of annuitie, and discharge the land. And Littleton putteth his case here surely upon a recoverie in a writ of annuitie, but if the grantee doth bring a writ of annuitie, and at the returne thereof appeare and count, this is a determination of his election in a court of record, albeit he never proceedeth any further." [They were stopped by the court.]

CROWDER, J.—I am of opinion that this rule, which calls upon the plaintiff to show cause why the verdict should not be entered for the defendant, on the ground that the facts admitted at the trial showed that the plaintiff had waived his right of re-entry, should be made *absolute. It appears to me that the facts show distinctly that there was a waiver of the forfeiture. The facts are these:— [*384 The defendant was tenant to the plaintiff under a lease which contained a covenant by the lessee not to underlet the premises without the consent in writing of the lessor. The defendant broke this covenant by underletting to one Frend in 1854. On the 30th of April, 1857, the plaintiff commenced an action against the defendant to recover the arrears of rent due from Michaelmas, 1854, to Lady Day, 1857. The writ was in the ordinary form: but by the particulars the action appeared to be brought for rent accruing up to the 25th of March preceding. For the defendant, it is said, that, although he had incurred a forfeiture by under-letting without the lessor's consent, yet the plaintiff had waived his right to take advantage of that forfeiture, by having, with knowledge of its existence, brought an action for the rent subsequently accruing, which action was continued by a judge's order referring it to the master, and under which the rent up to the 25th of March, 1857, was paid on the 23d of May. On the other hand, it is said, that, inasmuch as this action of ejectment was brought on the 16th of May, 1857, the very day on which the judge's order was made in the action commenced on the 30th of April, and before the money was paid in that action, the plaintiff's right of entry was not waived, and he was entitled on that day, viz., the 16th of May, to insist upon the forfeiture. The question, therefore, is, whether the bringing the action for the rent on the 30th of April, and the subsequent acceptance of the rent in that action, amounted to a waiver. I am of opinion that it did. Authorities have been cited,—amongst others, Doe d. Morecraft *v.* Meux, 4 B. & C. 606 (E. C. L. R. vol. 10), 7 D. & R. 98 (E. C. L. R. vol. 16), and Jones *v.* Carter, 15 M. & W. 718,†—to show that a landlord by bringing an ejectment sufficiently evinces an intention to treat *the tenant as a trespasser. And, at first, it appeared to me that the payment of the rent on the 23d of May could not [*385 operate as a waiver of which the landlord had previously elected to avail himself by bringing an ejectment on the 16th. In delivering judgment in Jones *v.* Carter, Parke, B., says: "After such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease, and bound to perform the covenants contained in it; and it would be unjust to permit the landlord again to change his mind, and hold the tenant responsible for the breach of duty after that time." The act there relied on as determining the landlord's option, was, bringing an ejection. How does that apply here? Here, the landlord, by bringing an action for rent accruing subsequently to the accrual of the forfeiture, and obtain-

ing payment of the rent by means of that action, has clearly made his election to treat the lessee as still being his tenant. Surely that as unequivocally shows the landlord's determination to treat the lease as an existing lease, as the bringing of an ejectment demonstrates an intention to treat the tenant as a trespasser. The tenant must under those circumstances be induced to consider himself still tenant, and could not conceive himself liable to be dealt with as a trespasser. There is also a strong expression of opinion to the same effect by the same learned judge in Doe *v.* Birch, 1 M. & W. 406.† It is true it was not necessary to the decision of the case; but still everything that fell from that very learned judge is entitled to weight. "The question of waiver," he says, "does not distinctly arise in this case. If it had, the authorities cited show that this was a lease voidable at the election of the landlord. Then I think that an absolute unqualified demand of the rent by a
*386] person having sufficient authority, would have *amounted to a waiver of the forfeiture, and it would have been like the case I cited from Croke's Reports." That dictum goes beyond what is necessary in the present case. The learned judge lays it down as his opinion that an unqualified *demand* of the rent would operate a waiver of the forfeiture. Here, there has been not merely a demand of the rent, but an action brought to enforce it. That seems to me to be an unqualified and conclusive act on the part of the landlord, showing a determination on his part to treat the lessee as still continuing his tenant. If this action were held to be maintainable, this gross inconsistency would result, viz., that the plaintiff, having already recovered the rent up to Lady Day, 1857, would recover the land by reason of the forfeiture in 1854, and also, as my Brother Willes suggested in the course of the argument, mesne profits down to the time of the verdict. Such a result could never be permitted. I think the authorities abundantly show, that, by such a demand as has been made here, the plaintiff has elected conclusively to treat the defendant as his tenant, and cannot afterwards turn round and make him a trespasser. For these reasons, I think the rule to enter a verdict for the defendant must be made absolute.

WILLES, J.—I am entirely of the same opinion. It has been contended on the part of the plaintiff that the bringing an action of ejectment was such an election on the part of the landlord to take advantage of the forfeiture and put an end to the term, as to prevent the subsequent acceptance of the rent from operating to revive the lease; and that that view is sustained by the decision of the Court of Exchequer in Jones *v.* Carter, 15 M. & W. 718.† I am glad we are not bound to lay down so capricious a doctrine as that, although the bringing an action
*387] of ejectment is an *unequivocal demonstration of intention on the part of the lessor to treat the lessee as a trespasser, yet the bringing an action to recover the rent is not an equally strong and unequivocal demonstration of his intention to treat him as continuing tenant. That, as it seems to me, would be a gross inconsistency, unless there be some substantial distinction between an action of ejectment for the recovery of the land and an action to recover the rent: and none such has been pointed out. It is not necessary, and therefore would be an unprofitable waste of time, to compare the writ of ejectment under the Common Law Procedure Act (15 & 16 Vict. c. 76) with the old writ of covenant for non-payment of rent. It is enough to say that each is

a demand in a court of record,—the one of the land,—the other of the rent. It would manifestly be inconsistent to hold that the writ of ejectment is an election by the landlord to treat the tenant as a trespasser, and that a writ of covenant for the rent would not be an election to treat him as tenant. I think we are bound to hold the one just as much an election as the other.

BYLES, J.—When the facts are carefully looked at, they seem to me to disclose as clear a case of waiver as could well be conceived. First, there is a demand of the rent, then an action brought to enforce that demand, and then a judgment signed in that action, and the rent paid by the tenant and accepted by the landlord. The plaintiff relies upon the lease for the purpose of enforcing payment of the rent; and now he says that during the same period it was mere waste-paper. That clearly can never be permitted. Rule absolute.

The receipt of rent accruing after a breach of covenant by a tenant, which by the provisions of his lease creates a forfeiture of the term, is a waiver by the landlord of his right of re-entry, if he was at the time aware of the forfeiture, but otherwise not, because the act is an affirmance of the existence of the tenancy: Jackson *v.* Brownson, 7 Johnson 227; Camp *v.* Pulver, 5 Barbour, S. C. 91; Clarke *v.* Cummings, Id. 339; Koeler *v.* Davis, 5 Duer 507; Jackson *v.* Sheldon, 5 Cowen 448; M'Keldore *v.* Darracott, 13 Grattan 278; but see Kenrick *v.* Smith, 7 Watts & Sergeant 47, as to the breach of a condition which makes the lease absolutely void. The mere receipt of rent due before the forfeiture has occurred, will not, for a like reason, produce this effect: Jackson *v.* Allen, 3 Cowen 220; Hunter *v.* Osterhoudt, 11 Barbour 33; Stuyvesant *v.* Davis, 9 Paige 427; Bleecker *v.* Smith, 13 Wendell 533: *contra*, Coon *v.* Bricket, 2 New Hampshire 163. Nor even if after a forfeiture will it operate to relieve from the consequences of a subsequent continuance of the original cause of forfeiture: Jackson *v.* Allen, 3 Cowen 220; Bleecker *v.* Smith, 13 Wendell 533. But where the landlord *distrains* for rent due before the forfeiture, with knowledge thereof, it will be a waiver, because that is an act which can only be done during the continuance of the tenancy: Jackson *v.* Sheldon, 5 Cowen 448; Stuyvesant *v.* Davis, 9 Paige 427; but see M'Keldore *v.* Darracott, 13 Grattan 278. On the other hand, after the landlord by ejectment has taken steps to enforce his right of entry, he cannot obtain any relief in equity against the tenant, such as an injunction to restrain the latter from collecting the rents from sub-tenants, which necessarily assumes the existence of the tenancy: Stuyvesant *v.* Davis, 9 Paige 427. See on this subject, generally, the opinions of the judges in Croft *v.* Lumley, 6 House of Lords Cases 672; 9 Ellis & Bl.

The foregoing observations refer principally, and for practical purposes only, to those breaches of covenant which are not susceptible of direct pecuniary compensation. With respect to the right of re-entry, which is often reserved in case of the non-payment of rent, it is clear that its exercise will at any time be restrained in equity, in the absence of any statutory regulation, upon a tender of the rent due, with interest and costs. In England, by the Statute of 11 Geo. 2, the same power is given to the courts of common law, in actions of ejectment to enforce such a forfeiture. Even where that power has not been expressly given, it is to be deemed, at least where there

is no Court of Chancery, an essential part of the ordinary judicial authority. In this point of view, the question as to the exact time of the tender becomes, in such case, of small importance: Atkins v. Chilson, 11 Metcalf 112.

*388] *HOLLINGHAM v. HEAD. *April* 16.

In an action for goods sold and delivered, the question being whether the sale was absolute or subject to a condition,—Held, that it was not competent to the defendant to call witnesses to prove that the plaintiff had made contracts with other persons subject to the condition suggested.

But the judge allowed the plaintiff to be asked, on cross-examination, whether he had not made such conditional contracts with others,—with a view of testing his credit or the accuracy of his memory. *Quære*, whether it was proper even to that extent?

THIS was an action for the price of a quantity of artificial manure sold by the plaintiff to the defendant.

At the trial before Williams, J., at the last Assizes for Sussex, it appeared that the plaintiff, who represented himself to be the agent of a company styled The Sussex Manure Company, was in the habit of travelling about to the different market towns to sell an article called Rival Guano; that he met with the defendant, who was the occupier of a farm in the county of Sussex, adjacent to a farm which had formerly been in the occupation of the plaintiff, and prevailed upon him to purchase a quantity of this guano; and that it turned out to be altogether worthless.

The defence set up was, that the article had been purchased by the plaintiff subject to a condition that it was not to be paid for unless it proved equal to Peruvian guano: and it was proposed, on cross-examination, to ask the plaintiff whether he had not made contracts with other persons for the sale of his Rival Guano upon the terms that the purchasers should not pay for it unless it turned out to be equal to Peruvian guano.

The learned judge permitted the question to be put, *for the purpose of testing the plaintiff's credit.*

The defendant's counsel then proposed to call witnesses to prove that the plaintiff had made contracts with other persons for the sale of his guano upon the terms suggested.

The learned judge ruled that this evidence was not admissible, as not being relevant to the issue, and res inter alios acta.

*389] *A verdict having been found for the plaintiff,

Montagu Chambers now moved for a new trial, on the ground of the improper rejection of evidence, and also that the verdict was against evidence. This case presents an exception to the general rule, res inter alios acta alteri nocere non debet. It may be departed from where it is essential to do so for the purpose of confirming the testimony of a witness, because it is just and right that this should be done. Lord Coke says,—Co. Litt. 152 b,—"It is holden for an inconvenience that any of the maxims of the law should be broken, though a private man suffer loss; for that, by infringing of a maxim, not only a general prejudice to many, but in the end a public incertainty and confusion to all would follow. And the rule of law is regularly true, res inter alios acta

alteri nocere non debet, et factum unius alteri nocere non debet; which are true, with this exception, unless an inconvenience would follow." In Rex *v.* Egerton, R. & R. C. C. 375, upon an indictment for extorting money under a threat of an abominable accusation, it was proposed to examine the prosecutor as to a subsequent ineffectual attempt by the prisoner to obtain a further sum by means of a similar threat; and Holroyd, J., received it (Wood, B., coinciding with him in its admissibility), "on the ground of its being offered as confirmatory of the truth of the prosecutor's evidence as to the transaction of the former day, and as to the nature of those transactions."(*a*) And, upon a case reserved, the evidence was held to have been properly admitted. So, in Llewellyn *v.* Winckworth, 13 M. & W. 599,† it was held, that, in an action against a *party as acceptor of a bill of exchange, accepted in his name by another person, when evidence has been given of a general authority in that person to accept bills in the defendant's name, an admission by the defendant of liability on another bill so accepted, is good confirmatory evidence of the former. [BYLES, J.—See the ground upon which Parke, B., puts it. He says,—"If you have proof(*b*) of the general authority, an admission of liability on another bill is confirmatory of it. In Cash *v.* Taylor, 8 Law J. (1830), K. B. 262, Lloyd & Welsby M. C. 178, the letter did not show that Tallents had a general authority *to accept bills*. There is a great distinction between the fact of *authorizing* another bill to be drawn on the defendant, and *admitting a liability* on another bill so drawn: the former is evidence of a general authority to accept bills for him; the latter may well be confirmatory of proof(*b*) of general authority. Here, there was ample evidence for the jury of a general authority: then, the defendant's admission of liability is strongly confirmatory of that."] The verdict was so directly in the teeth of all the evidence as almost to amount to a perverse verdict. [*390

WILLES, J.—I am of opinion that there ought to be no rule in this case. The question is, whether, in an action for goods sold and delivered, it is competent to the defendant to set up by way of defence that the plaintiff has entered into contracts with third persons in a particular form, with the view of thereby inducing the jury to come to the conclusion that the contract sued upon was not as represented by the plaintiff. I am clearly of opinion that it was not competent to the defendant to do so. The case put forward on the part of the plaintiff, was, that the defendant bought of him a quantity of a certain article called "Rival Guano," at a given price per ton. The *defendant, on the other hand, insists that it was one of the terms of the contract that he was not to pay for the article unless it turned out to be equal to Peruvian guano. The plaintiff, having given evidence in support of his case, was asked on cross-examination by the defendant's counsel whether he had not entered into contracts for the sale of his guano to other persons upon the terms suggested, viz., to be paid for only on condition that it proved equal to Peruvian guano. That question was disallowed as not being competent evidence for the purpose of establishing that the contract was made subject to that condition. And [*391

(*a*) Would it have been competent to the prosecutor to call a third person to prove a similar attempt by the prisoner to extort money from *him*?

(*b*) Evidence?

I understand that my Brother Williams also rejected similar evidence in chief, which was offered on the part of the defendant. I am of opinion that the evidence was properly disallowed, as not being relevant to the issue. It is not easy in all cases to draw the line, and to define with accuracy where probability ceases and speculation begins: but we are bound to lay down the rule to the best of our ability. No doubt, the rule as to confining the evidence to that which is relevant and pertinent to the issue, is one of great importance, not only as regards the particular case, but also with reference to saving the time of the court, and preventing the minds of the jury from being drawn away from the real point they have to decide. This rule is nowhere more clearly laid down than in the very able treatise by Mr. Best upon the Principles of Evidence, 2d edit. 319. "Of all rules of evidence," he says, "the most universal and most obvious is this,—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or form the subject of investigation. Its theoretical propriety can never be matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters in dispute between contending
*392] parties, *or which otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside, as beyond the jurisdiction of the tribunal, as tending to distract its attention and to waste its time." And the same learned author, in another part of his book, says,—p. 14,—"There is a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is sufficient basis of decision; but, in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required." Now, it appears to me that the evidence proposed to be given in this case, if admitted, would not have shown that it was more probable that the contract was subject to the condition insisted upon by the defendant. The question may be put thus,—Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would I think be fraught with great danger. Where, indeed, the question is one of guilty knowledge,—as in case of a charge of uttering base coin or forged notes,—such evidence is received as tending to establish a necessary ingredient in the crime. But I am not aware of any other instance. If such evidence were held admissible, it would be difficult to say that the defendant might not in any case where the question was whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or, in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other
*393] persons, or upon other persons of a *particular class, for the purpose of showing that he was a quarrelsome individual, and therefore that it was highly probable that the particular charge of assault was well founded. The extent to which this sort of thing might be carried is inconceivable. The only ground upon which it could at all be suggested that such an inquiry could be permitted on cross-examination, would be, that it was a means of testing the credit of the witness or the

accuracy of his memory. But I doubt even that: and that does not appear to have been the way in which it was put. As to the cases referred to,—Egerton's Case, R. & R. C. C. 375, is altogether distinguishable. There, the prisoner was charged with having extorted money from the prosecutor by means of a threat to charge him with a certain offence: and the prosecutor was allowed to give evidence of another ineffectual attempt by the prisoner to obtain money from him by similar threats,—in order to show the intention of the prisoner in making the demand. The evidence there was admissible because it was all part of one persecution of the prosecutor; it was relevant to the matter in issue, as showing the nature and character of the transaction in question. In Llewellyn *v.* Winkworth, 13 M. & W. 598,† which was an action against the defendant as acceptor of a bill of exchange accepted in his name by another person, evidence having been given of a general authority in that person to accept bills in the defendant's name, an admission by the defendant of liability upon another bill so accepted was held to be good confirmatory evidence. There, too, the evidence was relevant to the issue. For these reasons, I am of opinion that there is no pretence for granting a rule on the ground of misdirection or the improper rejection of evidence. As to the other branch of the motion,—for a new trial on the ground that the verdict was against the evidence,—if the learned judge who *tried the cause had expressed himself dissatisfied with the verdict, I should probably have thought a rule might be granted: but, as he has not so expressed himself, there will be no rule. [*394

Byles, J.—I am of the same opinion. This seems to me to be a perfectly clear case. It may be that the plaintiff might well have been asked, on cross-examination, with a view of testing his credit or refreshing his memory, whether he had not made other contracts such as the defendant suggested to have been made here. But, as substantive evidence in the defendant's case, it clearly was not admissible. It would be contrary to all precedent and to all principle.

Williams, J.—I entirely agree with the view presented by my Brother Willes; and I must say that it has rather inclined me to think that I was wrong in allowing the evidence even to the limited extent I did. I admitted it only for the purpose of pressing the memory of the witness, expressly ruling it to be inadmissible for the purpose of proving the substantive fact. As to this, there could be no doubt whatever. It would manifestly lead to great inconvenience, if the parties were to be allowed incidentally to investigate other transactions and dealings having no connection with the cause of action with respect to which they are at issue. With respect to the latter branch of the motion,—I cannot say that I think the verdict was wrong. It was purely a question for the jury: and it was very difficult for any one to say where the truth lay.

Rule refused.

*395] *SMITH *v.* LINDO. *April* 20.

A dealer (in London) in shares in a public company (whether British or Foreign), is a "broker" within the statute 6 Ann. c. 16, and incapable of suing for commission, unless duly licensed.

But, where an unlicensed person had assumed to act as a broker in the purchase of such shares, —Held, that he might recover from his principal the price which pursuant to a usage of the share-market he had been obliged to pay,—the statute of Anne not making the *contract* void, but merely preventing the unlicensed broker from recovering any remuneration for his services in making it.

THIS was an action for money payable for work done by the plaintiff for the defendant, at his request, as a broker, and for fees due and of right payable by the defendant to the plaintiff in respect thereof; and for scrip and shares sold and delivered by the plaintiff to the defendant; for money paid; and for money found to be due on accounts stated.

The declaration also contained a count stating that the defendant retained and employed the plaintiff, as such broker as aforesaid, to purchase for the defendant certain scrip certificates of shares on the London Stock Exchange, to be paid for by the defendant on the then next settling day on the said exchange, for reward to the plaintiff; and the defendant, on such retainer, authorized and requested the plaintiff to purchase the said scrip according to the usual terms of the said exchange, one of such terms being, that, in the event of the shares not being paid for at the time fixed for payment by the contract of purchase, the purchaser's broker shall be liable to indemnify the seller in respect of such default; that the defendant, on such retainer, agreed to save the plaintiff harmless in respect of such liability; that the plaintiff accepted such retainer, and did purchase the said scrip for the defendant on the said exchange, to be paid for on the said day, and on the terms aforesaid; and that the defendant did not, when the said day of payment (which had elapsed) arrived, save harmless, nor had he since saved harmless the plaintiff in the premises, but the defendant made default in the payment for the said scrip, whereby the plaintiff became liable to the said
*396] seller as aforesaid, and the said seller had sued and *recovered judgment against the plaintiff in respect of the plaintiff's said liability, and the plaintiff had thereby been put to heavy expenses and liabilities.

The defendant pleaded,—first, to the common counts, never indebted, —secondly, to the last count, that the defendant did not agree with, or retain or employ, or authorize or request the plaintiff as in that count alleged,—thirdly, to the last count, that the plaintiff did not purchase the said scrip for the defendant in manner or on the terms in the said last count alleged,—fourthly, to the last count, as to so much of the residue of the declaration as relates to work alleged to have been done, and money alleged to have been paid by the plaintiff for the defendant, that the said work alleged to have been done by the plaintiff for the defendant was done by the plaintiff within the city of London, as a broker for the defendant, that is to say, in and about the purchasing and bargaining and making contracts for the purchase for and on behalf of the defendant of divers scrip certificates purchased by the plaintiff for the defendant in a certain public company; that the said money alleged to have been paid by the plaintiff for the defendant, was money paid by the plaintiff within the said city of London, as such broker as

aforesaid, as the price of the said scrip certificates, in fulfilment and performance of the said contracts; that the plaintiff made such payments in his own wrong, and without any express request whatever from the defendant to pay the same; and that, except and by way of implication from the said retainer and employment of the plaintiff to purchase the said scrip certificates thereinbefore mentioned, *and from the usage and custom of the trade and business relating thereto,*(a) there never was any request whatever to the plaintiff *to pay the said price of the said [*397
scrip certificates; that the said retainer and employment of the plaintiff in the last count mentioned was a retainer and employment of the plaintiff to act within the city of London as a broker, and to purchase as such broker the said scrip certificates in the said last count mentioned for the defendant; that the said alleged purchase of the said scrip for the defendant in the said last count mentioned, was made by the plaintiff within the city of London as a broker; and that the plaintiff was not at the several times of the doing of the said alleged work, and the payment of the said money alleged to have been paid, and of the said retainer, employment, and purchase in the said last count mentioned, or either of them, a broker duly licensed, authorized, or empowered to act or practise as a broker in the premises, or any of them, within the said city of London, contrary to the form of the statute in such cases made and provided.

The plaintiff joined issue on the first three pleas, and took issue on the last.

The cause was tried before Byles, J., at the first sitting at Westminster in Hilary Term last. It appeared, that in the early part of the year 1857, a company was formed in London called the Hungarian Land Company; that prospectuses were issued, an office taken, and shares issued, and that the defendant was the solicitor to the company.

The plaintiff, who was called, stated that, in the beginning of August, he called upon Lindo, and suggested to him that it would be for the interest of the company to employ some person to go into the market to buy shares, and requested that he might be employed to perform this operation; that Lindo "acquiesced;" that he thereupon went into the market and bought three lots of shares, which were described in the *contract note as bought "on account of Lindo;" and that these [*398
notes were from time to time as the shares were bought (the 4th, 5th, and 6th of August) handed by him to Lindo. He admitted that he was not a member of the Stock Exchange, nor a licensed broker, but that he was a "dealer in shares."

It was further proved that, by the usage of the share-market, the broker, and not the principal for whom he buys, is the person looked to by the seller of the shares for payment on the settling day.

It appeared that the plaintiff had been compelled to pay 210*l.* to the sellers of the shares; which sum, together with 7*l.* 3*s.* 9*d.* for commission or brokerage, he now sought to recover from the defendant.

The defendant, who was called as a witness, stated that he had never authorized the plaintiff to buy the shares for him; that, on seeing his name in the contract notes, he asked the plaintiff why he had put it in, and told him he would have nothing to do with the shares; and that the

(a) Inserted on amendment of the plea.

plaintiff thereupon said he had been authorized by Nunez, the stock-broker of the company, to do as he did.

Nunez, who was also called, denied that he had ever given the plaintiff any instructions as to the purchase of the shares; but that, on the contrary, he distinctly told him he had no authority.

It further appeared that the plaintiff had first made this claim upon Nunez, whom he had called before the committee of the Stock Exchange, to compel him to pay the money; that Lindo appeared as a witness before the committee; and that the committee dismissed the complaint.

On the part of the defendant it was submitted, that the fourth plea was proved, the plaintiff having, according to his own account, acted as a broker in the purchase of the shares, charging commission as a broker; *399] and that, upon the authority of Cope *v.* Rowlands, 2 *M. & W. 149,† Pidgeon *v.* Burslem, 3 Exch. 465,† and Jessopp *v.* Lutwyche, 10 Exch. 614,† the plea, if proved, was a good answer to the plaintiff's claim.

The case being left to the jury upon the credit of the witnesses, they found a verdict for the plaintiff for 217*l.* 3*s.* 9*d.*: and leave was reserved to the defendant to move to enter a verdict for him on the issue on the fourth plea, if the court should be of opinion that it afforded an answer to the action: and leave was also reserved to amend the plea, if necessary.

Collier, Q. C., accordingly obtained a rule nisi to enter a verdict for the defendant, on the fourth plea, on the ground that that plea was proved,—the plaintiff to be at liberty to contend, upon the argument of the rule, if it should be necessary, that judgment should be entered for the plaintiff on that plea non obstante veredicto, on the ground that the plea was bad, and that it did not show an acting as broker within the act (6 Ann. c. 16); that scrip certificates in a public company are not within the statute; and that it would not defeat the claim for money paid.

Bovill, Q. C., *Geary*, and *Laxton*, now showed cause.—The question is whether the plaintiff is a "broker" within the 6 Ann. c. 16, s. 5, which enacts, "that if any person or persons from and after the determination of this present session of parliament, shall take upon him to act as a broker, or employ any other under him to act as such, within the said city (London) and liberties, not being admitted as aforesaid,(*a*) *400] every such *person so offending shall forfeit and pay, to the use of the said mayor and commonalty and citizens of the said city, for every such offence, the sum of 25*l.*, to be recovered by action of debt," &c. A *stock-broker* has been held to be a broker within that act: Janssen *v.* Green, 4 Burr. 2103; Clarke *v.* Powell, 4 B. & Ad. 846 (E. C. L. R. vol. 24), 1 N. & M. 492 (E. C. L. R. vol. 28); Cope *v.* Rowlands, 2 M. & W. 149.† [BYLES, J.—The judgment in Clarke *v.* Powell is almost a plagiarism on that of Best, C. J., in Gibbons *v.* Rule, 12 J. B. Moore 539, 4 Bingh. 301, where a *ship-broker* was held not within the act.] All the cases are noticed in those two judgments. [CROWDER, J.—Are stock-brokers, dealing in foreign stocks, brokers within the

(*a*) By s. 4, it is enacted that "all persons that shall act as brokers within the city of London and liberties thereof, shall from time to time be admitted so to do by the court of mayor and aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as that court shall think fit and reasonable," &c.

statute of Anne?(a) In Milford *v.* Hughes, 16 M. & W. 174,† where it was held that a person who hires or procures for another persons to be employed by him in the laying out and surveying of a line of railway, is not a broker within the act, Alderson, B. says: "The Law Dictionary defines brokers to be 'those that contrive, make, and conclude bargains and contracts *between merchants and tradesmen*, for which they have a fee or reward.'" In Wilkes *v.* Ellis, 2 H. Bl. 555, an auctioneer who sells goods by auction within the city of London, was held not to be a broker within the act. So, this plaintiff who was employed to buy and sell shares in an estate in Hungary, cannot be within the act. The statute imposing a tax, ought not, by its general words, to be held to impose that tax upon persons who were not known at the time, and have only come into existence since its passing. [CROWDER, J.—*Does not this plaintiff come within the definition in the 57 G. 3, c. IX.?] [*401 The legal construction of the 6 Ann. c. 16, is not to be affected by what the legislature in the 57 G. 3, c. IX. assume to be its intention. These shares are clearly not "goods, wares, or merchandise," within the statute of frauds: Tempest *v.* Kilner, 3 C. B. 249 (E. C. L. R. vol. 54); Bowlby *v.* Bell, 3 C. B. 284. [CROWDER, J.—That is fully settled.]

Assuming that the plaintiff is precluded from recovering the commission, there can be no reason why he should not recover back the money paid. He was employed by the defendant to purchase; and, by the custom, he becomes personally liable to pay: the purchase and the payment are two separate and distinct acts. The statute of Anne does not make the contract void: it merely says that the broker shall not recover for making it. In Pidgeon *v.* Burslem, 3 Exch. 465, 470,† Parke, B., says: "It is not disputed that the plea in this case would have been a good answer, if pleaded to so much of the plaintiff's demand as consisted of a remuneration for his services as a broker; the case of Cope *v.* Rowlands, 2 M. & W. 149,† being a decisive authority that such remuneration could not be recovered. But the plea is pleaded to the *whole* declaration, including the bills of exchange, and these are said to have been accepted on account of 319*l.* 16*s.* 4*d.* due and owing from the defendant to the plaintiff, for his, the plaintiff's, having as such broker made contracts of purchase and sale of shares, &c., and for *his having paid* for the use of the defendant such sums *as aforesaid*, that is, sums paid *as incidental* to his retainer and employment, upon and by virtue of and in and about the making or completing the said contracts. The words 'as incidental' are ambiguous, and it is difficult to say what is their precise meaning in this plea. In Johnson's Dictionary, the word incidental is said to *mean 'incident, casual, &c., not necessary to the chief purpose.' In Webster's, the word incident has, [*402 among other meanings attributed to it, 'appertaining to or following the chief or principal.' It by no means follows from the use of this term in the plea, that the payment of these sums was a necessary part of his duty as broker. It may mean, and probably does, that, because he was employed as broker, it happened that he was also employed to pay the whole or part of the purchase-money of the shares for the defendant:

(a) Time bargains in foreign funds are not within the prohibitions of the stock-jobbing act, 7 G. 2, c. 8: Wells *v.* Porter, 2 Scott 141, 2 N. C. 722 (E. C. L. R. vol. 29); Oakley *v.* Rigby, 2 Scott 194, 2 N. C. 732; Elsworth *v.* Cole, 2 M. & W. 31.†

but, if so, the plaintiff's disability to act as broker not rendering the *contract* void, but only disentitling him to any recompense for his services, there is no reason why he should not recover from the defendant the money he has paid at his request, express or implied. The case differs altogether from those in which the contract is forbidden, as, under the acts against stock-jobbing, or where the purpose for which the money was paid was illegal, as in De Begnis *v.* Armistead, 10 Bingh. 107 (E. C. L. R. vol. 25), 3 M. & Scott 511 (E. C. L. R. vol. 30), cited on the argument." So, in Jessopp *v.* Lutwyche, 10 Exch. 614,† where, to a declaration for money paid and on accounts stated, the defendant pleaded,—first, that the causes of action accrued after the passing of the 8 & 9 Vict. c. 109, under and by virtue of certain contracts made between the plaintiff and the defendant by way of gaming upon the market-price of shares,—secondly, that the causes of action accrued to the plaintiff as a broker in the city of London, about the purchasing and selling for the defendant in the city of London, of shares, and that the plaintiff was not duly licensed in pursuance of the statute,—it was held, on demurrer, that the pleas were bad: Parke, B., saying: "Pidgeon *v.* Burslem, 3 Exch. 465,† is precisely in point. It is consistent with the pleas that the defendant requested the plaintiff to pay
*403] over the money for him to a third party, and that in *fact it was so paid; in which case the defendant has no defence." [WILLES, J.—The gaming act does not create any illegality. BYLES, J.—It was assumed in that case that "share-brokers" are within the statute.] Knight *v.* Cambers, 15 C. B. 562 (E. C. L. R. vol. 80), and Knight *v.* Fitch, 15 C. B. 566, were also referred to.

Collier, Q. C., and *Archibald*, in support of the rule.—Neither the 6 Ann. c. 16 nor the 57 G. 3, c. IX., gives any definition of the term "broker." In the argument in Clarke *v.* Powell, 4 B. & Ad. 849, Follett says: "In popular language, a broker is a person who makes contracts for others. One of the definitions given of the word *broker* in Johnson's Dictionary is, 'one who does business for another.' In Jacob's Law Dictionary, brokers are described 'those who make bargains in matters of money or merchandise;' and he enumerates exchange-brokers, corn-brokers, *brokers of stock*, and pawnbrokers. In Blunt's Law Dictionary are mentioned 'exchange-brokers, mediators in any contract of buying and selling, or contracts of marriage, and pawnbrokers.' In Cowel there is a similar enumeration. The statute 1 Jac. 1, c. 21, gives the city of London the power of admitting brokers, and describes them as persons who make contracts between merchants and tradesmen." The definition given in the 10 Ann. c. 19, s. 121, seems to be large enough to embrace this plaintiff. By that section, a penalty is imposed on every person "who shall be employed as a broker in the behalf of any other person, to make any bargain or contract for the buying or selling of any tallies, orders, Exchequer Bills, Exchequer tickets, bank bills, or any share or interest in any joint-stock erected by act of parliament, &c., who shall take or receive, directly or indirectly, any sum of money or other reward exceeding 2*s.* 9*d.* per cent." The
*404] principle of the decision in *Clarke *v.* Powell seems to be this, that the statute of Anne is to be construed with reference to the exigency of the times and the expansion of commerce. Littledale,

J., after referring to the description of brokers given in the 1 Jac. 1, c. 21, says: "Though this was the occupation of regular brokers at that time, it is obvious, that, when a new subject of dealing was created in government securities, those who dealt in the same way respecting such securities, *might* fall under the same denomination. The class of men who dealt either partially or exclusively in this new description of security, might equally fall within the description of brokers as those who dealt partially or exclusively in some new description of merchandise." What is the difference in the occupation of a man, whether he buys and sells consols or railway shares? The fourth plea is substantially proved. Then, is it a substantially good plea? It is submitted that it is. In Cope *v.* Rowlands, 2 M. & W. 149,† Parke, B., says: "It is perfectly settled, that, where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void, if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition." And that has repeatedly been acted upon since. [CROWDER, J.—The contract with the broker may be void: but the contract to buy the shares is not void. If the contract for the shares is not void, the party must pay the money; and, if he pays the money, why should he not recover it back?] If the plaintiff recovers the money, it is because it is supposed to have been paid in pursuance of a request, which arises from a retainer and employment to do an illegal act. [CROWDER, J.—The contract for the sale of the shares to Lindo is perfectly good, though *the broker acted improperly in making that contract.] The case of Jessopp *v.* Lutwyche, [*405 10 Exch. 614,† is clearly distinguishable. Parke, B., there says: "It is consistent with the pleas that the defendant requested the plaintiff to pay over the money for him to a third party, and that in fact it was so paid; in which case the defendant has no defence." Here, the plea negatives any express request to pay the money. And, for the reasons before stated, there is no implied request of which the court can take notice.

CROWDER, J.—I am of opinion that the verdict for the plaintiff on the fourth plea must be set aside, and a verdict on that plea entered for the defendant. But, at the same time, I am of opinion that the plaintiff is entitled to judgment non obstante veredicto on that plea, on the ground that the plea is bad. The result will be, that there will be judgment for the plaintiff for the whole amount claimed. If, however, the defendant chooses, he may amend his plea, by confining it to the commission; and then there will be a verdict for him as to that, and the verdict for the plaintiff will be reduced to 210*l*. It appears to me that the plaintiff is not entitled to sue for commission as a broker; and that the plea as applied to that particular item of claim would be a good answer. The question is, whether the plaintiff is a broker within the meaning of the statute of 6 Ann. c. 16. The circumstance of the plaintiff's calling himself a broker and suing as a broker, is not material: we must look at the facts of the case, in order to be enabled to determine whether or not he is a broker within the contemplation of the statute. It is clear that he was not a licensed broker; and therefore, if within

the statute, he could not recover his commission. It appears that the
*406] shares which were the subject-matter of these contracts were *shares in a company called The Hungarian Land Company, by whom scrip was issued in the usual manner, and that the plaintiff was employed by the defendant to go into the market and purchase a large number of these shares for him; and for so doing the plaintiff charges the usual broker's commission. We must look at the term "broker" in the 6 Ann. c. 16, as having been used in its general popular sense. It is difficult for us at this day to determine with any degree of accuracy what brokers were at that time: there must be many things now dealt with by brokers that were then wholly unknown. But, the statute having used the term "broker" generally, we must endeavour to ascertain what was the popular understanding of the period. The 1 Jac. 1, c. 21, s. 1, describes the ancient brokers in the city of London as persons who dealt "between merchant English and merchant strangers and tradesmen, in the contriving, making, and concluding bargains and contracts to be made between them concerning their wares and merchandises to be bought and sold and contracted for within the city of London, and moneys to be taken up by exchange between such merchant and merchants and tradesmen." There is no precise description given of the articles dealt in by those brokers; therefore that statute affords us but little assistance. The whole subject underwent a great deal of discussion in the case of Clarke *v.* Powell, 4 B. & Ad. 846 (E. C. L. R. vol. 24), where the court held that a stock-broker is a "broker" within the statute of Anne. The question there arose upon a sale of government securities: but it seems to me to go the full length of deciding that a dealing in any similar securities would constitute a man a broker. In delivering the judgment of the court in that case, Littledale, J., referring to the description of brokers given in the 1 Jac. 1, c. 21, says,—"Though this
*407] was the occupation of regular *brokers at that time, it is obvious, that, when a new subject of dealing was created in government securities, those who dealt in the same way respecting such securities *might* fall under the same denomination. The class of men who dealt either partially or exclusively in this new description of security, might equally fall within the description of brokers as those who dealt partially or exclusively in some new description of merchandise." He then refers to the 8 & 9 W. 3, c. 20, s. 60, and to the 8 & 9 W. 3, c. 32 (an act to restrain the number and ill practice of brokers and stock-jobbers), and proceeds,—"In the 6 G. 1, c. 18, s. 21 (passed twelve years after the statute of Queen Anne), a penalty is imposed on *brokers* buying and selling shares in illegal undertakings. The 7 G. 2, c. 8, s. 8, mentions '*brokers*' with reference to transactions of buying and selling stock. Considering the provisions of these statutes, recently before and after the passing of the statute 6 Anne, it appears to us that persons buying and selling government stock and securities for others were considered as *brokers* at that time, and must fall under that description in the statute in question. If brokers dealing in government stock and securities then existing were so, it does not admit of a doubt that those who dealt in all subsequently-created stock, and securities of the like description, would be so; just as much as merchant brokers who bought or sold a new description of merchandise." It seems to me that the same argument

will apply here, and that the present plaintiff is equally a person falling within the description of a broker. I do not think it can make any difference that the shares here dealt in were shares in a foreign company. The dealing in securities of that sort seems to me as much to fall within the definition of a "broker" as the dealing in any other stocks, funds, or securities. For these reasons, I am of opinion that the plaintiff cannot recover for commission.

*The next question is, whether, though disabled from recovering the commission, the plaintiff may not recover the money which he paid on behalf of the defendant. It is said that he was as much acting as a broker in paying the money as he was in making the contract, and therefore equally disabled from recovering it back. I am of opinion, however, that the plaintiff is entitled to recover back the money so paid. It appears from the evidence that there exists a usage in the share market that all brokers dealing in shares shall be considered and treated as principals in the transaction, and personally held liable to pay the price. The existence of that usage does not, however, make it part of the duty of the broker as broker to pay the money for his principal. It is incident to his employment in so far as the usage may bind him; but it is not necessarily part of his duty as a broker. If Lindo himself had furnished the money, Smith would equally have been acting as a broker in the transaction. There is nothing in the statute of Anne to prevent the plaintiff from recovering back money paid under such circumstances. Pidgeon *v.* Burslem, 3 Exch. 465,† and Jessopp *v.* Lutwyche, 10 Exch. 614,† substantially decide this point; and particularly what Parke, B., says in the latter case,—"The statute relating to brokers only precludes them from recovering remuneration for their services as such;" and, in giving judgment,—"It is consistent with the pleas that the defendant requested the plaintiff to pay over the money for him to a third party, and that in fact it was so paid; in which case the defendant has no defence." And in Pidgeon *v.* Burslem, the same learned judge says: "It by no means follows from the use of this term ['incidental'] in the plea, that the payment of those sums was a necessary part of his duty as broker. It may mean, and probably does, that, because he was employed as *broker, it happened that he was also employed to pay the whole or part of the purchase-money of the shares for the defendant; but, if so, the plaintiff's disability to act as broker not rendering the *contract* void, but only disentitling him to any recompense for his services, there is no reason why he should not recover from the defendant the money he has paid at his request, express or implied." So, here, the contract which the plaintiff made for the purchase of the shares being good, by necessary implication a contract arises for the recoupment of the plaintiff of the money which by the usage he was bound to pay for the defendant. [*408] [*409]

For these reasons, I am of opinion that the plaintiff is entitled to judgment non obstante veredicto on the fourth plea.

WILLES, J.—I am of the same opinion. I think the plaintiff was clearly acting as a broker within the 6 Ann. c. 16. There are many cases the result of which shows that there exists a class of brokers who did not exist at the time of the statute of Anne; but that persons who deal after the manner of the brokers at that time, though they deal in

stocks and other things not known then, are still within the act brokers. The plaintiff, therefore, having contravened the statute, is disabled from recovering his commission. Then, as to the money. It appears that there is a usage amongst persons who deal in shares, similar to that which prevails on the Stock Exchange, that the buying broker is treated as principal, and responsible for the payment of the price of the shares. The members of the Stock Exchange suppose that by this arrangement of contracting in their own names, and abstaining from disclosing the names of their principals, they preclude the seller from having recourse to the real buyer. In this they are probably mistaken. But, be that as it may, the *usage is, that, if the principal does not provide *410] the money to pay for the shares on the settling-day, the buying broker must do so himself: and any person dealing in shares is bound by that usage. The question is, whether, where the broker pays money for his principal, he can recover it back. But for the statute of Anne, there could be no doubt upon the subject. But, does the broker act as broker in paying the money? I apprehend he does not. He pays the money as a contracting party, according to the usage of the share-market, and not as broker. The plaintiff therefore is entitled to recover back the money paid, but not the commission. But, as it stands at present, the fourth plea professes to be an answer to both. The defendant has proved his plea in point of fact; but, as far as regards the money paid, it is a bad plea, and therefore the plaintiff is entitled to judgment non obstante veredicto. If the defendant chooses, however, to confine it to the commission, he may so amend it, upon the terms of paying the costs of this rule. If no amendment be made, there will be judgment for the plaintiff non obstante veredicto, for the whole amount.

BYLES, J.—I am of the same opinion. It is a very old and a very sound rule in the interpretation of statutes, that its words are to be construed according to their ordinary grammatical and popular sense, unless so construing them would lead to any inconsistency or repugnancy. If this statute of Anne had passed in the last session of parliament, I apprehend there could have been no doubt that the plaintiff would have been within it. The 6 Ann. c. 16, however, having passed more than one hundred and fifty years ago, we must resort to contemporaneous exposition to enable us to arrive at its meaning. Now, the statutes which passed shortly before and shortly after the statute of *411] Anne, *which have been referred to, clearly show that the term "broker" was there used in the sense which is now understood and contended for on the part of the defendant. I should have entertained no doubt whatever, but for some expressions which fell from Best, C. J., in Gibbons *v.* Rule, 12 J. B. Moore 539 (E. C. L. R. vol. 22), 4 Bingh. 301 (E. C. L. R. vol. 13). Then, as to the money,—that was not paid by the plaintiff while acting as a broker, but was paid in pursuance of a usage of the share-market, which makes the person who actually buys responsible to the seller for the price of the shares. That, therefore, does not fall in any way within the statute. The result is, that the plaintiff is entitled to recover back the money which was paid by him in respect of a contract which is valid because the statute does not apply to it. The verdict will, therefore, be for the defendant upon the fourth plea: but there will be judgment for the plaintiff thereon non

obstante veredicto, unless the defendant elects to amend that plea by limiting it to the commission; in which case the plaintiff will have a verdict for the amount of the money paid only.

Rule accordingly.(*a*)

(*a*) The defendant did not amend, and consequently the rule was drawn up to enter a verdict for the defendant on the fourth plea, and a judgment for the plaintiff non obstante veredicto on that plea. The defendant afterwards brought a writ of error, which was argued in the Exchequer Chamber at the sittings after Trinity Term, 1858, when the judgment was affirmed. Vide post.

As to what constitutes a "broker," within the meaning of statutes imposing a penalty on those who exercise that occupation without a license, see Commonwealth *v.* Holmes, 11 Penna. State 470; Chadwick *v.* Collins, 26 Id. 270.

Where the consideration of a security for money is entire, and part thereof is legal and part illegal, the whole contract fails and there can be no recovery: Frazier *v.* Thompson, 2 Watts & Serg. 235. But where the subject of the action consists of several distinct and independent items, and there is no express promise covering the whole, a recovery may be had for so much as is lawful. Thus, where in assumpsit for services rendered as an auctioneer, in selling a number of lots of wood, it appeared that the wood had been sold in two counties, in only one of which the plaintiff had an auctioneer's license, it was held that the claim might be apportioned, and a verdict obtained for commissions on the sales which were made according to law: Robinson *v.* Green, 3 Metcalf 159.

*WHITWELL *v.* PERRIN. *May* 7. [*412

Necessaries were furnished to a ship on the order of the ship's husband (himself a part owner). by whom alone the ship was managed:—Held, that the co-owners were liable, although part of the supplies had been paid for by bills drawn by the ship's husband upon the brokers of the ship, and, on the bankruptcy of the latter, the plaintiff had proved against their estate for the balance.

THIS was an action for the price of goods supplied by the plaintiff to a vessel at Bristol called the Eliza, of which the defendant was part owner.

The cause was tried before Crowder, J., at the last Assizes at Bristol. The facts which appeared in evidence or by admission were as follows:—The defendant had shares in the Eliza and in several other vessels. He was registered as owner of the Eliza, but never interfered with the management. The goods which were the subject of the action were supplied to the ship upon the orders of the plaintiff's father, who was a part owner, and the ship's husband, and the account had been sent in to Messrs. Perrin & Co., the ship's brokers, who had been in the habit of receiving the freights and paying the ship's disbursements; and bills had been drawn upon them for a portion of the goods, and paid by them; and, on their bankruptcy, the plaintiff proved against their estate for the balance. The defendant was not a member of that firm. There was evidence that he had received a share of profits as part owner from the ship's brokers.

On the part of the defendant, it was submitted that there was no evidence to go to the jury as against him.

The learned judge was of opinion that there was evidence for the jury, and he accordingly left the case to them, and they found for the plaintiff, damages 68*l.*; and leave was reserved to the defendant to move to enter the verdict for him, if the court should be of opinion that there was no evidence which ought to have been submitted to the jury.

*413] *Collier*, Q. C., on a former day in this term, obtained *a rule nisi accordingly. He referred to Reed *v.* White, 5 Esp. N. P. C. 121, Griffiths *v.* Hicks, 15 Law Times 349, Myers *v.* Willis, 17 C. B. 77 (E. C. L. R. vol. 84), Brodie *v.* Howard, 17 C. B. 109, Hackwood *v.* Lyall, 17 C. B. 124, and Abbott on Shipping, 10th edit. 73.

Slade, Q. C., and *Prideaux*, now showed cause.—There was ample evidence to go to the jury that Whitwell, the ship's husband, had authority to bind the owners for necessaries supplied for the ship. Myers *v.* Willis, Brodie *v.* Howard, and Hackwood *v.* Lyall, have no bearing upon the present case. The register is not conclusive evidence of ownership; nor is ownership conclusive of the question of liability: the real question is, whether the debt has been contracted by one having authority to contract on the behalf of the owners.

Collier, Q. C., and *W. R. Cole*, were called upon to support the rule. —It is conceded that the defendant was neither the managing owner nor the person contracted with. The only ground upon which it is sought to make him liable, is, that the contract was made by one who was acting as his agent: but it is clear from the evidence that the plaintiff looked only to the managing owner or the brokers. Reed *v.* White, 1 Esp. N. P. C. 121, is very like this case. It was there held, that, if a person who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband (a part owner) only, and settles with him alone, he discharges the other owners, particularly if the bill be renewed. In Rich *v.* Coe, Cowp. 636, it was held, that, though the master of a vessel be also lessee of it, by agreement with the owners, for a term of years, under covenants on their part, that he shall have the sole management of the ship, and employ her for his own *414] sole benefit, &c., and on his part that he *shall repair her at his own sole cost and charge, &c., the owners are still liable for necessaries furnished for the ship by order of the master, though without their knowledge, or without their being known to the persons who supplied them. Lord Mansfield, in giving judgment, there says: "Whoever supplies a ship with necessaries has a triple security,—1. The person of the master,—2. The specific ship,—3. The personal security of the owners, whether they know of the supply or not. The master is personally liable, as making the contract. The owners are liable in consequence of the master's act, because they choose him. They run the risk, and they say whom they will trust with the appointment and office of master. Suppose the owners in this case had delivered the value of the goods in question in specie to the master, with directions for him to pay it over to the creditors, and the master had embezzled the money, it would have been no concern of the creditors; for, they trust *specifically* to the *ship*, and *generally* to the *owners*. In this case, the defendants are the owners; and there happens to be a private agree-

ment between them and the master, by which he is to have the sole conduct and management of the ship, and to keep her in repair, &c. But, how does that affect the creditors, who, it is expressly stated, were total strangers to the transaction? And that is an answer to the observation that the plaintiff must have known the real situation of the master in this case, from the general usage and custom of the country in that respect. To be sure, if it appeared that a tradesman had notice of such a contract, and, in consequence of it, gave credit to the captain individually as the responsible person, particular circumstances of that sort might afford a ground to say he meant to absolve the owners, and to look singly to the personal security of the master. But here it is stated that the plaintiff *had no notice whatever of the contract." Wherever credit is given to an agent, with knowledge that he is [*415 acting merely as agent, the party so dealing with the agent is precluded from afterwards having recourse to the principal: Paterson *v.* Gandasequi, 15 East 62: per Lord Tenterden, C. J., in Thomson *v.* Davenport, 9 B. & C. 78 (E. C. L. R. vol. 17), 4 M. & R. 110,—"If at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of Addison *v.* Gandassequi, 4 Taunt. 574, and Paterson *v.* Gandasequi, 15 East 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." That is precisely what the plaintiff has done here. He chose to give credit to the agent, taking bills upon the brokers, and afterwards, on their failure, proving the debt against their estate. That was conclusive evidence of his election to treat with the brokers, to the prejudice of the owners, inasmuch as the earnings of the ship were thereby diverted from their legitimate application, viz., the purchase of supplies. If the plaintiff had intended to charge the owners, he ought not to have proved against the estate of Messrs. Perrin & Co.: Ex parte Field, in re Rogers, 3 Mont. D. & De Gex 95.

WILLIAMS, J.—I am of opinion that this rule should be discharged. There appears to have been evidence which put the point beyond all controversy, that the defendant received a share of the profits arising from the ship, and that he was fully aware that the person who gave the orders for the goods in question was the ship's *husband, and as [*416 such had the management of the ship. That clearly was evidence to be submitted to the jury. It is said there was conclusive evidence here that credit was given, not to the owners of the Eliza, but to Messrs. Perrin & Co. But I must confess I am utterly at a loss to see any evidence upon which the jury could with propriety have decided in favour of the defendant. But, even if there were any evidence, it was a question for them; and I think they have come to a right conclusion.

WILLES, J.—I am entirely of the same opinion. The goods in question were ordered by the ship's husband, and were necessary for her use. The defendant received his share of the profits earned by the ship: and there was abundant evidence to show that he authorized the ship's husband to do what was necessary to keep the ship in an efficient state. To entitle a person who has done repairs or furnished goods for a ship to

sue the owners, it is not necessary that the credit should have been actually given to them. But here it is said that the ship's husband must be taken to be the only debtor, because bills on the brokers had been taken from him for the amount. The bills, however, were merely taken for the plaintiff's convenience, to put him in funds. The brokers failing to pay, the plaintiff clearly had a right to pursue his remedy against those who are legally liable, viz., the owners.

BYLES, J.—Since the case of Mitcheson *v.* Oliver, 5 Ellis & B. 419 (E. C. L. R. vol. 85), the law is restored to what it formerly was, viz., that the mere fact of a man being owner or part owner of a ship, or registered as owner, does not make him liable for work done or goods ordered for the ship: but, as Jervis, C. J., puts it in Brodie *v.* Howard, 17 C. B. 109, 117 (E. C. L. R. vol. 84), the question is, with whom was the contract? *Was the party giving the orders the agent of the owners for that purpose? The mere fact of the goods being ordered by the captain or the ship's husband is no evidence to go to the jury. But here, not only was the defendant beneficially interested, but he knew that Whitwell the elder was acting as the ship's husband, and he received a share of profits. That clearly was evidence to go to the jury that the ship's husband had authority to contract on behalf of the owners.

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CROWDER, J.—I am of the same opinion. I must confess I thought this an undefended cause. The goods were ordered from time to time by the ship's husband, and the account sent in to the ship's brokers, who divided the profits, of which the defendant, who was one of the part owners, received his share. It is said that the fact of the plaintiff having received bills from the brokers for part of the demand, was a conclusive election on his part to treat them as his debtors, and precluded him from afterwards having recourse to the owners. There is no foundation for that argument. The bills were taken for the plaintiff's convenience. The question for the jury was, whether the orders given by the ship's husband were given by the authority of the defendant. I think there was strong evidence to go to the jury that they were.

Rule discharged.

*418] *EVERSFIELD *v.* JOHN NEWMAN and EDWARD NEWMAN. *May* 6.

It is not necessary that the grounds for issuing it should appear in a rule or order for a prohibition.

A. was found taking sand from premises in the occupation of B. (under a lease), and was given into custody by B. on a charge of stealing it. On appearing before a magistrate, A. denying that B. had any right to the land, the charge was dismissed as involving a question of title. A. afterwards sued B. in the county court for false imprisonment. A prohibition having issued under a judge's order,—the court set it aside, on the ground that no question of title could arise on the hearing.

ON the 14th of December, 1857, a plaint was entered in the Shoreditch county court, at the suit of John Eversfield, against John Newman and Edward Newman, to recover damages for an alleged false imprisonment.

On the 13th of January, 1858, an order was made by Byles, J.,(*a*) for a writ of prohibition, to be directed to the judge of the county court, prohibiting the hearing of the said cause therein. This order was obtained upon an affidavit by Edward Newman, in which it was alleged, amongst other things, that, by an indenture of demise dated the 29th of August, 1854, made between Thomas Blumson of the one part and Edward Newman of the other part, Blumson demised to Edward Newman a piece of ground in Nova Scotia Gardens (describing it), to hold the same to Edward Newman, his executors, administrators, and assigns, for ninety-nine years from the 24th of June then last, at the yearly rent of 60*l.*: That deponent took the said lease for the purpose of using the said piece of ground as a place of deposit for road-dust collected by him in the course of his business as a dust-contractor, and also to enable him to sell the same to builders: That the deponent was informed by his son, the defendant John Newman, that the plaintiff was in the habit of entering upon the said piece of land and taking therefrom some of the road-dust: That the deponent caused the plaintiff to be warned, that, if he took the said road-dust from the said ground, he would be given into custody for stealing the same: That, the plaintiff persisting in taking the said road-dust from the said piece of ground, the *defendant John Newman gave him into custody, and he was taken to the police-station: That the charge was heard before [*419 the magistrate at the Worship Street police court, when it was stated that the deponent had no right to the said piece of ground, and the magistrate dismissed the charge, on the ground that a question of title was involved in the matter, which had better be taken before a superior court: That the plaintiff had caused the said summons to be issued for the said imprisonment, and that the deponent was advised that a question as to his right and title to the said piece of ground would be probably raised, which the county court had no jurisdiction to try.

J. A. Foot, on a former day in this term, moved for a rule to show cause why the order of Byles, J., and the writ of prohibition issued in pursuance thereof, should not be set aside. The affidavit upon which the motion was founded, stated, that, on the 14th of December last, the plaintiff John Eversfield entered a plaint in the Shoreditch county court against John and Edward Newman for false imprisonment; that the hearing was appointed for the 18th of January, but, on the 13th, the defendant Edward Newman, upon an ex parte application to Byles, J., obtained an order for a writ of prohibition to issue, directed to the judge of the county court, prohibiting the hearing of the cause therein; that the circumstances which gave rise to the said plaint being entered were as follows,—On the 7th of October last, the plaintiff was employed by one Wilson to sift a quantity of sand, and, whilst so employed, he was given into custody by the defendant John Newman on a charge of stealing the sand, and, after remaining in custody a considerable time, he appeared before the magistrate at the police office, Worship Street, and was then ordered to be discharged; that the plaintiff did *not claim title to the said land; that he was only a common labourer; [*420 and that he was advised and believed, that, if the action was allowed to proceed in the county court, no question of title to the said land, or any

(*a*) Pursuant to the 13 & 14 Vict. c. 61, s. 22.

part thereof, would arise, as the plaintiff merely sought to recover compensation for the false imprisonment as before mentioned.

The learned counsel referred to Bacon's Abridgment, *Prohibition* (K), pl. 16, where it is said, "In Mendyke *v.* Stint, 2 Mod. 271, these things were agreed by the court: 1. That, if any matter appears in the declaration which showeth that the cause of action did not arise infrà jurisdictionem, there a prohibition may be granted at any time: 2. If the subject-matter in the declaration be not proper for the judgment and determination of such court, there also a prohibition may be granted at any time: 3. If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead it, &c., or if his plea be not accepted, or is overruled: in all these cases, a prohibition likewise will lie at any time." And also to In re Still *v.* Booth, 1 L. M. & P. 440, New County Court Cases 375, where Wightman, J., says,—"Every writ of prohibition must show grounds on the face of it, when special grounds are stated on affidavit." He submitted that the application for the prohibition was premature, and that the order should have shown upon the face of it the ground for the prohibition.

CROWDER, J.—I am of opinion that it is not necessary that the order should state the grounds of the prohibition. It would be very inconvenient if it were so: it would be introducing a sort of special pleading, which would be productive of much mischief. Upon the other grounds, the rule, I think, may go, and also for a procedendo.

*421] *WILLES, J.—I entirely agree that the order need not have shown upon the face of it the grounds upon which it is issued. The reasons upon which the application is founded are never stated in a rule for a mandamus, or an order to arrest an absconding debtor under the 1 & 2 Vict. c. 110, or for an execution against a shareholder in a joint-stock bank under the 7 & 8 Vict. c. 110, s. 68; and yet, in all these cases, the special grounds must appear by affidavit. It would be introducing needless doubts and difficulties into the administration of the law to hold that the grounds for the prohibition must appear on the face of the order.

A rule having accordingly been granted to set aside the order and the writ of prohibition issued in pursuance thereof, and for a writ of procedendo to the judge of the county court commanding him to proceed with the plaint,

Beasley now showed cause.—He submitted, that, inasmuch as the affidavits disclosed a possibility of the title to the land coming in question, the jurisdiction of the county court was ousted.

Foot was not called upon.

CROWDER, J.—The rule must be made absolute. On no conceivable view of the matter could the title to the land come in question here. It appears that the plaintiff was in the habit of taking sand from off a piece of land in the occupation of the defendant Edward Newman, and that, being caught in the fact, he was given into custody upon a charge of stealing it. The charge was not of a trespass on the defendant's land, but of stealing his property. For this, the plaintiff has brought

*422] an action for false imprisonment. I cannot *see the remotest possibility of any question of title to the land being brought in question. The cause must be tried in the county court.

WILLES, J.—I am of the same opinion. The title to the land could not possibly come in question here. If the plaint had been for a trespass in removing the plaintiff from the land, and the defendants had justified under a plea in the nature of molliter manus imposuerunt, then the right to the possession of the land might have come in question. But that is not what was done here. The plaintiff was not requested to leave the land, but he was taken into custody on a charge of stealing a chattel belonging to one of the defendants on the land. The county court judge might well entertain the complaint, even though incidentally the plaintiff thought fit to assert that the defendants had no title: Dutens *v.* Roberts, 1 H. Bla. 100.(*a*) But it does not appear that he had any intention to do so.

BYLES, J.—I also am of opinion that this rule should be made absolute. Upon the affidavit used before me at Chambers, it appeared that the title of Edward Newman to the land was denied before the magistrate, and he was thereby induced to dismiss the charge. The probability that the same question would be raised before the county court induced me to make the order. Upon consideration, however, it does not appear to me that any question of title could arise, and therefore there is no ground for a prohibition. Rule absolute.

(*a*) Cited post, p. 432.

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*In the Matter of a Plaint between EMERY and BARNETT. [*423

May 6.

A mere assertion of title will not oust the jurisdiction of the county court: the title must be bonâ fide brought into question.

A. was let into possession of premises as tenant to B., and paid him rent. C. claiming title, A. gave up possession to him in consideration of a sum for crops. In an action in the county court by B. against A., to recover arrears of rent, and also possession of the premises,—Held, that whether C.'s title could be set up or not, depended upon whether A. had been evicted by title paramount, or had voluntarily yielded up possession.

ON the 31st of March, 1858, a plaint was entered in the county court of Shropshire holden at Market Drayton, and a summons thereon served for hearing on the 12th of April, in which William Emery was plaintiff and John Barnett defendant, for the recovery of a house, land, and premises at Stoke Heath, the yearly rent of such tenement being 8*l.*, and for the recovery of 11*l.* 6*s.* 3*d.* rent and arrears of rent due from the defendant to the plaintiff in respect of the same premises. At the hearing it was proved on behalf of the plaintiff, that he verbally let the premises to the defendant from the 25th of March, 1856, at the yearly rent of 8*l.*, and that thereupon the defendant entered and occupied the premises, and in or about the month of February, 1857, paid to the plaintiff one half-year's rent due the 29th of September previously; that the plaintiff and defendant afterwards signed an agreement or demise in writing, bearing date the 7th of April, 1857, for the yearly tenancy by the defendant under the plaintiff of the said premises from the 25th of March, 1857, at the like rent of 8*l.* per annum, payable half-yearly, on the 29th of September and 25th of March in every year; and it was one of the terms of the said agreement that the said tenancy might be

determined by either party upon giving six months' notice at Michaelmas in any year.

It was further proved on the part of the plaintiff, that the defendant offered to give up possession of the premises to him (the plaintiff) prior to the 29th of September, 1857, upon certain terms which the plaintiff
*424] *refused to agree to; and that, on the 22d of that month, it was verbally agreed between the defendant and one James Dutton (with the consent of the plaintiff) that the defendant should give up the said premises to the said James Dutton on the following Michaelmas Day, and that Dutton should pay the defendant for his hay on the premises, and that the defendant should pay the rent of the premises to Michaelmas Day; but that the defendant did not carry out the said agreement, but, on the contrary, gave up the possession of the premises previously to the said Michaelmas Day to one John Stones, who, it was alleged, claimed to be entitled thereto.

It was also proved, that, on the 29th of September, 1857, the plaintiff gave the defendant a notice to quit at the then next Lady Day; and that, on the 2d of October, 1857, a distress was levied on the premises for 8*l.*, a year's rent due on the 29th of September, under which distress certain goods were seized and sold.

On behalf of the defendant, it was proved that John Stones had, after the signing by the defendant of the agreement above mentioned claimed to be owner of the premises, and, in June, 1857, gave him notice not to pay any more rent to any one; that the defendant afterwards informed the plaintiff of Stones's claim; and that the defendant had delivered the possession of the premises to Stones, or to some person on his behalf.

On the part of the defendant it was objected, on the authority of a case of Mountnoy *v.* Collier, 1 Ellis & B. 630, that, the title to the land being bonâ fide in question, the judge of the county court had no jurisdiction to determine the plaint. The judge thereupon, conceiving that the title was in question, held that he had no jurisdiction, and accordingly declined to proceed.

*425] *Prentice*, on a former day in this term, upon an *affidavit of these facts, obtained a rule calling upon the judge of the county court and the defendant respectively to show cause "why the said judge should not hear and determine the said plaint, and why such order should not be made as to the costs of and occasioned by this application to the court as to the court should seem fit." (*a*)

Unthank now showed cause, upon an affidavit stating, that, upon the hearing of the cause, it was proved, on cross-examination of the plaintiff's son, that the defendant had, in June or July, 1857, informed him that a person of the name of Stones had demanded possession of the

(*a*) The 43d section of the 19 & 20 Vict. c. 108, enacts that "no writ of mandamus shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior court, or a judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer of a county court, and also the party to be affected by such act, to show cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shown, the superior court or judge thereof may by rule or order direct the act to be done; and the judge or officer of the county court, upon being served with such rule or order, shall obey the same, on pain of attachment; and, in any event, the superior court or the judge thereof may make such order with respect to costs as to such court or judge shall seem fit."

premises sought to be recovered in the action, and given him due notice not to pay any more rent to the plaintiff, and that the defendant had given up possession of the premises to Stones, who was then in possession thereof, and that he believed the notice received from Stones was after the defendant had signed the agreement of the 7th of April, 1857: That, on the conclusion of the plaintiff's case, it was objected, on the *part of the defendant, that the judge of the county court had no jurisdiction to determine the plaint, on the ground that the title to the said premises was in question; but the judge said, that, before he decided that the title was in question, he must be satisfied that the claim was made bonâ fide, and he should require some evidence in support of such claim: That it was then proved on behalf of the defendant, that Stones, accompanied by an attorney, in or about the month of June, 1857, called upon the defendant at Stoke Heath, and demanded possession of the said premises, and gave the defendant notice not to pay any more rent to the plaintiff; and that, in pursuance of such demand and notice, the defendant had, previously to the 29th of September, 1857, upon Stones agreeing to pay him for his growing crops, yielded up possession of the said premises to Stones: That it was further proved on behalf of the defendant, that Stones was then in possession of the premises, which he claimed as heir-at-law of his father, John Stones, deceased, who claimed under the will of Francis Stones, deceased: That the defendant was prepared, by the will of Francis Stones, and by further evidence, to show that the question of title was raised bonâ fide, and that the claimant John Stones was the person really entitled to the premises: And that the judge, being satisfied that the claim was made bonâ fide, and that the title to land did come in question, declined further to proceed with the cause, saying that he had no power to inquire into the validity of such title. [*426

As a general rule, no doubt, a tenant is estopped from disputing the title of the landlord by whom he has been let into possession. But that which took place here, assuming Stones to have had a good title, was equivalent to an eviction. The question therefore was, whether he was a mere trespasser, or a person *having title. In Mountnoy *v.* Collier, 1 Ellis & B. 630, a plaint was brought in a county court for use and occupation. It appeared that the plaintiff demised the premises to the defendant for a year from Michaelmas, 1850, and the defendant occupied from that date up to the time of the trial. The defendant paid the rent to the plaintiff for the half-year up to Lady Day, 1851, but refused to pay rent afterwards. It was proved that one J., claiming to be the plaintiff's landlord, had given the plaintiff notice to quit, expiring at Lady Day, 1851, and ordered the defendant not to pay the plaintiff any rent after that day; and that the plaintiff and C., a deceased occupant of the premises in question, had paid 10*s.* rent to J. The plaintiff contended that this payment was for a part only of the premises; the defendant, that it was for the whole. The defendant offered to prove by declarations of C., the deceased tenant, that C. paid rent for the whole. The judge rejected the evidence; but gave judgment for the defendant, on the ground that the plaintiff's title had expired as to part, and that the rent was not apportionable. On appeal on a case stating the above facts, it was held that the judgment could not be supported; that the evidence ought to have been received; and [*427

that if, when received, it showed that the defence was bonâ fide, it would sufficiently raise a question of title to deprive the county court of jurisdiction under the statute 9 & 10 Vict. c. 95, s. 58. [WILLES, J.—Rent was claimed here for six months after the tenant gave up possession.] Yes. [BYLES, J.—Must not the tenant, before the estoppel ceases, deliver up the possession to the person from whom he received it?] No case has held that the tenant is bound to resist a bonâ fide claim of title. [CROWDER, J.—To discharge the tenant, there must be an actual eviction, or something tantamount to it: Carpenter *v.* Parker, 8 C. B. N. S. 206 (E. C. L. R. vol. 91). *In Mountnoy *v.* Collier, the title had expired. But, may the tenant in any case hand over possession to a claimant?] In the case of a lease by mortgagor, if the mortgagee gives notice of his claim, the lessee ceases to be liable on his covenants. [CROWDER, J.—That is eviction by title paramount.] The tenant is in no case bound to incur costs to free himself from adverse claims. [BYLES, J.—In Doe d. Knight *v.* Lady Smythe, 4 M. & Selw. 347, it was held that a third person cannot defend as landlord upon the trial of an ejectment, where it appears that the tenant in possession came in as tenant to the lessor of the plaintiff, and paid rent to him under an agreement which has expired. *Bovill*, Q. C.—Doe d. Bullen *v.* Mills, 2 Ad. & E. 17 (E. C. L. R. vol. 29), 4 N. & M. 75 (E. C. L. R. vol. 30), 1 M. & Rob. 385, comes nearer. There, A. having, without title, entered upon land, and built a cottage, afterwards accepted a lease (by indenture) from B.: C. claiming the land as his own, paid to A. 20*l.* to give up the possession to him: and it was held (in ejectment on the demise of B. against C.), that A. had estopped himself from controverting the title of B., and that C. was bound by the estoppel, as having come in under and received the possession from B. CROWDER, J.—Does not the tenant controvert the title of his landlord by giving up the possession to a stranger? BYLES, J.—In Doe d. Manton *v.* Austin, 9 Bingh. 41 (E. C. L. R. vol. 23), 2 M. & Scott 107 (E. C. L. R. vol. 28), one T. held premises under a lease from one B., and paid rent to B. and to his personal representatives after his death: on the expiration of the lease, T. surrendered the premises to the defendants: and it was held that the defendants could not dispute the title under which T. came in. Tindal, C. J., there says: "The principle is, that a tenant shall not contest his landlord's title: on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession."] That is a totally different case: there, the third party came *in by assignment under the tenant. The court cannot interfere, unless they can clearly see that the title could not come in question. The question the judge will have to try will be, whether there was an eviction by title paramount or not. The 50th section of the 19 & 20 Vict. c. 108, gives the landlord the option of proceeding for the recovery of possession against the tenant or "any person holding or claiming by, through, or under him." Here, Stones is not claiming by, through, or under Barnett. Emery cannot place himself in a better position by proceeding against the defendant, than if he had proceeded against Stones; and, if this action had been brought against Stones, the title clearly would be in question. [BYLES, J.—If the tenant had merely walked out, and Stones had walked in, Stones would not have been estopped from denying Emery's title. But here Stones came in under an arrangement with the

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tenant.] The transaction was bonâ fide. Unless the court can say that it is impossible that the title can come in question, the case cannot be sent back to the county court. It would be an usurpation upon the jurisdiction of that court to try the question of bona fides here.

Bovill, Q. C., and *Prentice*, in support of the rule.—The defendant takes premises of the plaintiff, pays him rent, and submits to a distress for subsequent rent. He is therefore clearly estopped from disputing his landlord's title. The rent was payable half-yearly, on the 29th of September and the 25th of March. The action in the county court was brought to recover half a year's rent due for a period during which the defendant actually occupied the premises, and for a half-year accruing since, and also to recover possession of the premises. The answer attempted to be set up, is, that the defendant has yielded up the possession of the land *to a stranger, in consequence of a claim of title, and in consideration of a claim of a payment of 20*l*. What right [*430 can the tenant, or any one let in by him under such circumstances, possibly have to set up a title adverse to the admitted title of the landlord? [WILLIAMS, J.—Suppose this had been an action for the rent only, and the tenant had pleaded an eviction by title paramount,—would there be here any evidence to go to the jury?] Certainly not. [WILLIAMS, J. —That seems to be the whole question. If there is any evidence to go to a jury of an eviction by title paramount, the issue cannot be tried in the county court.] In order to oust the jurisdiction of the county court, it is not enough that a claim of title is suggested; but the proviso in the 9 & 10 Vict. c. 95, s. 58, as to actions "in which the title to any hereditaments shall be in question," extends only to actions in which the question of title actually arises in the course of the trial: Latham *v.* Spedding, 17 Q. B. 440 (E. C. L. R. vol. 79).

WILLIAMS, J.—I am of opinion that this rule must be made absolute. Upon looking at the affidavits, it seems to be quite clear that the judge declined to hear and decide the case. He appears to have thought that a question of title arose, and that he had no jurisdiction, as soon as he was satisfied that a bonâ fide claim to the property was set up by a third party. He considered that a change of possession was enough to make him hold his hand. I am, however, of opinion that he ought to have gone further, and inquired whether the defendant left the premises by compulsion of Stones, the claimant, or voluntarily. If he found that the defendant was *turned out*, then the question of title would have arisen, and the case would have come to a point at which the jurisdiction of the county court ceased, and the judge ought not to have heard any more. If, on the other hand, he found that the tenant went out *voluntarily*, and *that the possession was changed under an arrangement between the tenant and Stones, under which the former was [*431 to get a sum of money for going out, no question of title *could* arise, because, by the ordinary and well-known rule of law, both the tenant and Stones would be estopped from disputing the landlord's title.

CROWDER, J.—I am of the same opinion. The judge of the county court seems to have proceeded upon the notion that a bonâ fide claim of title was sufficient to oust his jurisdiction. That is clearly a mistake. The language of the 58th section of the 9 & 10 Vict. c. 95, is, where the title to land "is in question." Now, it appears here that the defendant was let into possession of the premises as tenant under the plaintiff,

and that a person named Stones, claiming to be entitled to them, induced the tenant to go out and give up possession to him. When the matter came before the county court, Stones having thus been let in, he made what the judge thought was a bonâ fide claim, and so he held that his jurisdiction was at an end. It is a clear rule of law, that a tenant cannot be allowed to dispute his landlord's title. And, if the tenant voluntarily lets another into possession, the person so let in is in the same position as the tenant himself, and is equally estopped. Here, it appears that Stones, the person claiming title, came in after a notice to the tenant not to pay rent to the plaintiff, and, further, that he promised to pay the tenant something for the crops. The tenant, it seems, was anxious to get out of possession, and had offered terms to his landlord. There was some evidence, therefore, that Stones was let in voluntarily by the defendant. It was the duty of the judge, under these circumstances, to decide the first question, viz. whether the letting Stones in was the voluntary act of the defendant, or whether Stones entered compulsorily; *in short, whether there was an eviction by title paramount. If Stones came in by the permission of the tenant, he would be in no better position than the tenant himself. But, if the judge arrived at the conclusion that Stones was in by compulsion, then he would have said that the title to the land was in question. The case must, therefore, go back. As to a portion of the claim for rent, viz. for the half-year during which the defendant was in actual occupation of the premises, the judge was at all events bound to hear the matter.

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WILLES, J.—I am of the same opinion. The matter may be tested in this way. If the county court judge had decided in favour of the landlord, and a prohibition had been moved for, in order to sustain the application it must have been shown that the judge disposed of a question of title, and not merely that a claim of title was made before him; and for this reason; the question of eviction depends upon two things, —first, whether the party evicting has a good title,—secondly, whether the tenant is compelled to quit against his will. Without proposing to offer any opinion as to what ought to be the decision of the county court judge, I will merely observe that it is only necessary to look at the affidavits to see that the tenant was far from being unwilling to go out. It will, however, be for the judge to determine that. If the tenant voluntarily withdrew, the case will be disposed of without determining the title. In Dutens *v.* Roberts, 1 H. Blac. 100, it was held, that, where the subject of a suit in an inferior court is within its jurisdiction, the circumstances of a matter incidentally arising in the course of the proceedings which is out of its jurisdiction, will not afford ground for a prohibition, unless it be shown that the court is proceeding to adjudicate thereon.

BYLES, J.—I am of the same opinion. The judge of *the county court has not considered the question of eviction all. He seems to have thought that the transaction amounted to a defence not only to the claim for the half-year's rent which accrued after he alleged eviction, but that the estoppel would override the whole rent due. As to the first half-year, the matter clearly must go back. The decision of the county court judge as to the rest depends upon the question whether or not there was a voluntary relinquishment of possession by the tenant. Stones's making a claim of title, if the tenant

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voluntarily yielded to it, would not oust the jurisdiction of the county court. The defendant must also show that he was *turned out*, and that under a claim of title paramount; and, further, that that claim was well founded. Upon both questions, therefore, it is clear that the judge has misconceived his duty, and the case must go back to the county court.

Bovill, for the plaintiff, prayed that the rule might be made absolute with costs.

WILLES, J.—The necessity for the application arises from the fault of the judge,—a judge of a court of record,—who mistakenly supposed that he had no jurisdiction. It is not, therefore, a case for costs.

Rule absolute, without costs.

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*NEWMAN *v.* ROOK, The Vestry of ST. MATTHEW, BETHNAL GREEN, Garnishees. *May* 8. [*434

Quære, whether a notice of attachment out of the Lord Mayor's Court, London, is any answer to an order under the garnishee clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125?

At all events, service of such a notice upon the vestry-clerk of a parish without the limits of the city can have no operation upon a debt due from the vestry to the judgment-debtor.

To entitle the garnishee to a writ under s. 64, he must satisfy the court or judge that he has a real ground for disputing his liability for the debt.

JUDGMENT having been recovered by Newman against Rook for a debt of 152*l.* 10*s.*, and there being a sum of 79*l.* 8*s.* 9*d.* due to the defendant from the vestry of the parish of St. Matthew, Bethnal Green, a summons was taken out on the 28th of April, requiring the vestry to show cause why the debt should not be attached under the garnishee clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.(*a*) The vestry-clerk *admitted that 79*l.* 8*s.* 9*d.* [*435

(*a*) The 60th section enacts that "it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment-debtor should be orally examined as to any and what debts are owing to him, before a master of the court, or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment-debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act."

The 61st section enacts that "it shall be lawful for a judge, upon the ex parte application of such judgment-creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment-debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment-debtor shall be attached to answer the judgment-debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before a judge or a master of the court, as such judge shall appoint, to show cause why he should not pay the judgment-creditor the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt."

The 62d section enacts that "service of an order that debts due or accruing to the judgment-debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debt in his hands."

And the 63d section enacts that, "if the garnishee does not forthwith pay into court the amount due from him to the judgment-debtor, or an amount equal to the judgment-debt, and does not dispute the debt due or claimed to be due from him to the judgment-debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee, towards satisfaction of the judgment-debt."

was due from the vestry to Rook, but alleged, that, on the 21st of April last, he as such vestry-clerk was, when within the jurisdiction of the Lord Mayor's Court, London, served with an attachment issuing out of that court against the said vestry, in an action wherein one Goodwin was plaintiff, and Rook was defendant, and the vestry garnishees, whereby all such moneys, goods, and effects as the vestry then had, or which thereafter should come into their hands or custody, of Rook, were attached to answer Goodwin in a plea of debt, and that the debt sworn to by Goodwin was 28*l.* 12*s.* The learned judge (Williams, J.) thereupon made an order for the payment over of the balance only.

Beasley now moved for a rule calling upon the vestry as garnishees to pay over the 28*l.* 12*s.* A simple notice of an attachment is no answer to an application under this statute. [WILLES, J.—The operation of the statute is to give the judgment-creditor the same rights exactly as the judgment-debtor himself had. WILLIAMS, J.—The question is, whether, *436] in order to make the attachment *from the Lord Mayor's Court effectual against the order of this court under the statute, there must not be an execution executed: Wetter *v.* Rucker, 4 J. B. Moore 172 (E. C. L. R. vol. 16), 1 B. & B. 491 (E. C. L. R. vol. 5); Magrath *v.* Hardy, 4 N. C. 782 (E. C. L. R. vol. 33), 6 Scott 627, 6 Dowl. P. C. 749; Webb *v.* Hurrell, 4 C. B. 287 (E. C. L. R. vol. 56).] It is clear, that the notice of attachment could not be pleaded in bar to an action brought by the judgment-debtor to recover the debt. It is a mere inchoate lien. The 62d section of the 17 & 18 Vict. c. 125 binds the debt in the hands of the garnishee from the service of the order: but there is no such general law in favour of the attachment out of the Lord Mayor's Court. [WILLES, J.—In Holmes *v.* Tutton, 5 Ellis & B. 65 (E. C. L. R. vol. 85), it was held that the effect of s. 62 is, that the service binds the debt so as to render the judgment-creditor a creditor having security for his debt within s. 184 of the Bankrupt Law Consolidation Act, 1849, but does not give him a lien so as to bring him within the exception in that section, and consequently that the judgment-creditor could not prevail against the assignees. In Hirsch *v.* Coates, 18 C. B. 757 (E. C. L. R. vol. 86), this court held that an order upon a garnishee under the 63d section has no operation upon debts of which the judgment-creditor has already divested himself by assignment. The question is whether a debt attached is not in the same condition as if assigned.] In Locke on Attachment 20, it is said, that, "when an action is commenced by the defendant in the attachment against the garnishee, it is a sufficient answer by the garnishee to such action, to plead and prove a recovery by foreign attachment at the suit of a creditor of the plaintiff (the defendant in the attachment), and that such creditor had execution of the sum recovered according to the custom of London, *and that such execution was executed* of the moneys or goods in the hands of the garnishee. But, when no execution is sued against *437] the garnishee, the *plaintiff may proceed to judgment and execution against the defendant, and in like manner the defendant may sue the garnishee for his debt, notwithstanding the unexecuted judgment. Certified in writing by Brooke, Recorder, in the case of Roberthon *v.* Norroy, King-at-Arms, 7 Ed. 6, 2." Dyer 83 a. A simple attachment confers no title: it is merely the commencement of an action. Besides, here the debt was not susceptible of attachment at all in the

Lord Mayor's Court. The vestry of St. Matthew, Bethnal Green, are not within the jurisdiction of that court. A service upon the vestry-clerk, who happened to be in the city, was no service upon the vestry.

Barnard showed cause in the first instance.—The judgment-debtor has filed a declaration of insolvency, and, consequently, according to Holmes *v.* Tutton, 5 Ellis & B. 65 (E. C. L. R. vol. 85), if an adjudication takes place, the debt will pass to the assignees, even if the court make the order as prayed. It is only where the garnishee admits that he has in his hands money of the judgment-debtor, that the court will make an order under s. 61. The case of a disputed liability is provided for by s. 64, which enacts, that, "if the garnishee disputes his liability, the judge, instead of making an order that execution shall issue [under s. 63], may order that the judgment-creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment-debtor if less than the judgment-debt, and for costs of suit; and the proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revisor issued under the Common Law Procedure Act, 1852." [CROWDER, J.—There can be no need for such an inquiry if the facts are undisputed.] The parties ought not to be *deprived of the opportunity of putting their defence upon the record. [WILLES, J.—To entitle the [*438 garnishees to have recourse to the 64th section, there must be a substantial dispute.] They dispute their liability to pay the money to this judgment-creditor. [WILLIAMS, J.—Are the vestry of St. Matthew, Bethnal Green, debtors within the jurisdiction of the Lord Mayor's Court?] They were properly served by their clerk within the jurisdiction. [WILLES, J.—They are not a corporation.] Under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, the district board of works is a corporate body; and by the 220th section it is enacted that "any summons or notice, or any writ or other process at law or in equity, or any other matter or thing whatsoever required to be served upon the metropolitan board of works, or any district board or vestry, may, unless herein otherwise provided, lawfully be served by delivering the same personally to the clerk of such respective board or vestry, or by leaving the same at the principal office of such board or vestry." [WILLIAMS, J.—To entitle you to a writ under the 64th section of the Common Law Procedure Act, 1854, you must satisfy the court or a judge that there is just ground for ordering the writ to issue. The question here is, whether it is a just ground for disputing your liability to pay this debt to the judgment-creditor, that you surmise that a foreign attachment is pending.] There is a material distinction between an attachment of money and an attachment of goods: in the case of the latter, to be subject to attachment, they must be within the jurisdiction; but, in the case of the former, it is enough that the debtor is within the jurisdiction when served with the notice. For instance, a man's account at a West-end banker's may be attached by a service upon one of the firm within the jurisdiction; it being supposed that he has *the debt in his pocket. [WILLES, J.—Is every member of a [*439 corporation supposed to carry all the debts of the corporation in his pocket? And, does the same presumption extend to the clerk?] It

is a fiction which the custom of London sanctions, with a view to favouring commerce.

WILLIAMS, J.—I am of opinion that this rule must be made absolute. The circumstances of the case are these:—A judgment having been obtained against Rook, the ordinary proceeding takes place under the Common Law Procedure Act, 1854, to attach a debt in the hands of third parties. The garnishees dispute their liability, on the ground that the debt has been attached by process out of the Lord Mayor's Court, and contend that that is ground sufficient to induce the judge to direct a writ to issue under the 64th section. I am of opinion that the meaning of that clause is, that, instead of ordering execution to issue against the garnishee, the judge may in his discretion, if he thinks there is sound reason to believe that the garnishee has ground for disputing his liability, direct a writ to issue. Now, here, the only reason suggested why the money should not be paid over, is, that the debt has been attached in the Lord Mayor's Court. To this it is answered, and I think successfully, that the attachment is altogether void, as not being authorized by the custom of London, as certified to the court by Serjt. Brooke, the recorder, in the case of Roberthon *v.* Norroy, King-at-Arms, Dyer 83, a. The custom so certified is, "that, if a man sue another before the mayor, &c., and a third person is indebted to the defendant in as much as the suit of the plaintiff is for, and by the custom of the law of attachment the third person is condemned, and judgment given against him, notwithstanding the judgment, if no execution be sued out against the
*440] third *person, the plaintiff may resort back to have judgment and execution against the defendant who is his principal debtor; and he(*a*) may also sue the third person for his debt, notwithstanding the judgment unexecuted, &c." The question is whether this is a debt due from a person within the city. The debtors are the vestry of St. Matthew, Bethnal Green. I am clearly of opinion that they are not debtors within the city; and that the case is not in any degree varied by the fact of the attachment having been served upon the vestry clerk within the city; and consequently that the law of foreign attachment cannot be resorted to here.

CROWDER, J.—I am also of opinion that this rule must be made absolute. It is unnecessary to decide upon the present state of the law of foreign attachment.

WILLES, J.—I entirely agree with the reasons given by my Brother Williams for making this rule absolute. The vestry of St. Matthew, Bethnal Green, appear to be a corporate body; but they are not in any sense within the city of London. If, indeed, each individual member of the body were to go within the city, the *corporation* would not be there. As to the second question, it may be very fit to be considered whether the mere service of the notice of attachment from the Lord Mayor's Court would prevent the sheriff from taking in execution goods so attached. As to whether it is sufficient for the garnishee to say he disputes the debt, to make it incumbent on the judge to order a writ to issue under the 64th section of the Common Law Procedure Act, 1854, I should say that the mere assertion by the garnishee that he disputes the debt amounts to nothing: there is no substantial dispute until some real answer or defence is set up.

(*a*) The principal debtor.

*BYLES, J.—Upon the last point I am clearly of opinion that the rule must be made absolute. The vestry is a corporate body having no habitat within the city. Rule absolute, without costs. [*441

WRIGHT *v.* M'GUFFIE. *May* 8.

The court will not, at the instance of a defendant, postpone the trial of a cause, on the ground of the absence of a material and necessary witness, where the witness is a captain in the service of the defendant, and the defendant has been guilty of laches in abstaining from securing the testimony of the witness when within his power.

WORDSWORTH, Q. C., on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the trial of this cause should not be postponed until the first sitting in Michaelmas Term next.

The action was brought to recover 115*l.* 15*s.* 7*d.*, being the balance alleged to be due from the defendant for work done and goods supplied to a vessel called the Sea Witch, of which the defendant was owner. The defendant had paid 84*l.* into court. The action was commenced on the 31st of December, 1856: issue was joined on the 27th of January, 1857, and notice of trial given for the sittings after the then Hilary Term.

On the 2d of February, 1857, an order was made by Willes, J., to postpone the trial on the ground of the absence of a material witness, until the sittings after Trinity Term, upon the defendant bringing 105*l.* into court. No further proceeding was taken until the 10th of December last, when notice of trial was given for the first sitting in Hilary Term last.

On the 4th of January, 1858, the trial was further postponed until the sittings after the present term, upon 50*l.* more being brought into court. The affidavit upon which that order was obtained, stated, amongst other things, that, from information which was partly contained in two letters from the proposed witness *(John Leuty, the master of the Sea Witch), the first of which bore date "at sea," the 4th of June, 1847, and the second "Mauritius," the 10th of July, and partly also from the contents of the "Overland Commercial Gazette," published at Port Louis, Mauritius, on Saturday, the 11th of July last, the deponent learned that the Sea Witch was driven from the Beypoor Roads (Beypoor being the port of her destination on her outward-bound voyage) on the 20th of May preceding, and, after having experienced a heavy gale of wind, during which she sprung a leak, and "was compelled to bear up and stand to the southward, with the intention of making the southern passage to Bombay, but afterwards found it necessary to put into Port Louis, Mauritius, for repairs, at which last-named port she arrived on the 20th of June;" that, by a letter written by Leuty, dated "Off Beypoor, the 2d of May, 1857," in reply to a letter addressed to him on the subject of the plaintiff's demand, he said, "with regard to Wright, I think you have done perfectly right in defending the case; it is a great imposition;" that, by another letter written to the deponent by Leuty, from Bombay, and bearing date the 3d of November, 1857, deponent was informed that Leuty had tendered the ship for conveyance of coolies to the Mauritius, and had just received notice that she was accepted, [*442

and that he hoped to leave about the 20th of the same month; that, in another letter from Leuty, dated the 17th of November, 1857, the deponent was informed that the ship was still at Bombay, and nearly ready to receive the coolies on board, and that he expected to get a good freight home from the Mauritius, after landing the coolies there; that, in another letter also written by Leuty from Bombay, and dated the 4th of December last, was the following paragraph,—"At last I have got the coolies on board: and I drop these few lines by the pilot
*443] when he leaves me. Things are still in a bad *state here; freights 87*s.* 6*d.* for Liverpool, and very little to be got at that miserably low rate. I hope things will be better at the Mauritius,"—from which letter, and the fact of its having reached him by the last overland mail, the deponent inferred and believed that the ship had sailed from Bombay for the Mauritius on or about the day of the date thereof, and in the ordinary course of events the ship might be expected to arrive in England in or about the month of April next, but not at any earlier period; that, in the judgment and belief of the deponent, Leuty was a material and necessary witness; and that the application to postpone the trial was not made with a view to delay the plaintiff, but solely that a proper trial of the case might be had.

The further affidavit upon which this motion was founded, stated, that, on the 4th of May instant, the deponent received a letter from John Leuty, the master of the Sea Witch, dated "Bombay, the 8th of April, 1858," in which he states that he had engaged freight for London, and would begin to take in cargo on the 12th, and hoped to be at home in four months and a half from that date.

Morgan Lloyd now showed cause, upon an affidavit of the plaintiff, in which he swore that he delivered his account for the work and materials and goods in respect of which the action was brought, to John Leuty on the 22d of December, 1856, when he assented to the charges therein, except the price of the water-closets, which he said he thought were charged too much; that the order of the 4th of January last was made upon an affidavit, in which it was alleged that the captain of the Sea Witch was about to take a cargo of coolies from Bombay to the Mauritius, and, immediately on discharging them, to load the ship with
*444] a cargo for England, and that he would return to this country in *the month of April; that, by a reference to the "Shipping and Mercantile Gazette," and from information which the deponent had received, he had ascertained that the Sea Witch did go to the Mauritius as alleged, but that, instead of taking a cargo thence for England, she returned with a cargo to Bombay; that the deponent had been informed, and believed, that the captain had no intention of returning or bringing the vessel back to England: and that the application for a further postponement of the trial was made merely with a view to delay the payment of the plaintiff's demand. The learned counsel submitted that no ground was laid in the affidavits to justify a further postponement of the plaintiff's claim.

Wordsworth, in support of the rule, submitted that enough was stated to show that the application was bonâ fide made.

WILLIAMS, J.—This case certainly presents some difficulty; but, upon the whole, I am of opinion that the rule should be discharged. The action, it appears, was commenced so long ago as the 31st of December,

1856; and immediately afterwards the defendant became aware that the captain would be a material witness for the defence. It was his duty, therefore, to take all reasonable steps to secure the testimony of a witness who was thus under his own immediate control. Instead of doing so, he allows him to go for seventeen months to different parts of the world. I think the plaintiff, who has got a money demand against the defendant, ought not to be prejudiced and delayed of his remedy by a misfortune of this sort occurring to the defendant by a matter which was clearly under his own control. The order of the 29th of January, 1857, was obtained upon the supposition that the witness would beyond doubt have been back by the sittings after *Trinity Term. It was the defendant's duty to take steps to procure his attendance [*445 then. He seems, however, to have done nothing, but to have left the matter altogether to chance. I do not think he is entitled to any further indulgence. The cause must be tried in its course. I trust that full justice will be done, notwithstanding the absence of the defendant's witness: but, if there be any failure, he will have himself alone to blame for it.

CROWDER, J.—I agree with my Brother Williams in thinking that enough is not shown here to justify us in further enlarging the time for proceeding to trial. The affidavit upon which the second postponement was granted showed the condition of the ship in consequence of the gale she encountered in May last; but we have no authentic account of what has become of the ship or the master since that time. If the defendant chooses to employ his captain in proceeding to different parts of the world, it is his own fault that he is not here when wanted. It is now suggested, that, in all probability, the ship will return to England about four months hence. This would make it nearly two years from the commencement of the action to the time of trial. That clearly is too long a delay. Another observation arises here. It is sworn on the part of the plaintiff, that, when his bill was delivered, the defendant objected only to one item. The defendant now alleges that the captain informs him by letter that the whole bill is a gross imposition. He does not, however, condescend upon particulars. The rule must be discharged, the costs being plaintiff's costs in the cause.

The rest of the court concurring,

Rule discharged accordingly.

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*CRASKE, Administrator of EDWARD WALKER, deceased, v. SMITH and Another. *May* 7. [*446

An appeal from a decision of a judge at chambers will not be entertained after the lapse of a term.

The plaintiff recovered 40*s.* only in an action under Lord Campbell's Act; and the judge on the 21st of August refused to grant a certificate under the 13 & 14 Vict. c. 61, s. 12, that the cause was proper to be tried in the superior court. In the following Michaelmas Term, the plaintiff applied by summons for costs under the 15 & 16 Vict. c. 54, s. 4, and the judge endorsed thereon "no order." An application to the same effect was made to the court in Hilary Term:—Held, that this was in effect *an appeal against the decision of the 21st of August*, and therefore that the motion was too late.

THIS was an action under Lord Campbell's Act, 9 & 10 Vict. c. 93,

to recover damages from the defendants for having, by the negligence of a servant employed by them to drive a wagon and horses, caused the death of one Edward Walker, a labourer.

The cause was tried before Willes, J., and a special jury (summoned at the defendants' instance), on the 4th of July last, when a verdict was found for the plaintiff, damages 40*s*. The learned judge having left the court before the verdict was returned, the plaintiff's counsel had no opportunity of asking him to certify, under the statute 13 & 14 Vict. c. 61, s. 12, that the cause was a proper one to be tried in the superior court. An application was afterwards (on the 6th of July) made to him for that purpose, but he declined to certify unless the plaintiff's junior counsel could satisfy him that the cause could not have been tried in the county court. An opinion to that effect having been obtained from counsel, and transmitted to the learned judge upon the circuit, his Lordship *on the 21st of August* finally refused a certificate.

On the 10th of November last, a summons was taken out calling upon the defendants to show cause why the master should not be at liberty to tax the plaintiff his costs of the action, under the statute 15 & 16 Vict. c. 54, s. 4. This summons came on to be heard before Willes, J., on the 12th, when he declined to make any order.

Torr, on the 27th of January last, obtained a rule calling upon the
*447] defendants to show cause why the *master should not be at liberty to tax the plaintiff his costs of the action, pursuant to the 4th section of the 15 & 16 Vict. c. 54, together with the costs of the several applications to the judge for his certificate, and of this application.

Shee, Serjt., and *Prentice*, now showed cause.—The application is too late. This is in effect an appeal against the decision of the learned judge who tried the cause, and who has refused to certify that "it appeared to him at the trial that there was a sufficient reason for bringing the action in this court." The trial took place on the 4th of July, 1857; the first application to the judge for a certificate was made on the 6th of that month; and the second on the 21st of August; on which last-mentioned day the certificate was finally refused: and this rule was not moved until the 27th of January, 1858. Orchard *v.* Moxsy, 2 Ellis & B. 206 (E. C. L. R. vol. 75), is precisely in point. There, in a case where the Court of Queen's Bench had concurrent jurisdiction with the county court by statute 9 & 10 Vict. c. 95, s. 128, the plaintiff recovered only 40*s*. damages: this sum he accepted from the defendant without prejudice to any claim for costs; and he summoned the defendant to show cause before a judge at chambers why the costs should not be taxed and paid by the defendant to the plaintiff: the judge, considering that a discretion on this point was vested in him by the statute 13 & 14 Vict. c. 61, s. 13, refused to make an order: *in the next term but one after this decision*, the plaintiff moved the Court of Queen's Bench that the costs might be taxed and paid to him by the defendant,—relying on a
*448] decision of the Court of Common Pleas(*a*) since the hearing at *chambers, that the judge, under s. 13, was bound to grant costs: and it was held that the application was too late. Coleridge, J., there says: "It is a rule that the party who intends to complain of the decision of a judge at chambers must come speedily; otherwise, the opposite party

(*a*) Macdougall *v.* Paterson, 11 C. B. 755 (E. C. L. R. vol. 73). And see Crake *v.* Powell, 2 Ellis & B. 210 (E. C. L. R. vol. 75).

may have supposed that everything was settled, and have acted accordingly, so as to disable him from paying the costs."

Torr, in support of his rule.—The refusal of the learned judge on the 21st of August to grant a certificate under the 12th section of the 13 & 14 Vict. c. 61, is no bar to an application to the court under the 15 & 16 Vict. c. 54, s. 4. [WILLIAMS, J.—You were bound to come within a reasonable time.] There is no limit of time for an application under this statute: Reid *v.* Gardner, 8 Exch. 651.† There, a cause was tried in one of the superior courts in February, 1852, and the plaintiff obtained a verdict, and accepted the damages awarded. In February, 1853, the plaintiff applied for an order for costs under the 15 & 16 Vict. c. 54, s. 4. The defendant had been during the interval abroad. And it was held that the application for costs was in time. [WILLIAMS, J.—The question there was, whether the application to the judge was in time: here, you come, in effect, to complain of a decision of a judge at chambers. You ought not to have allowed a term to pass over.] The application to the judge under this statute was made during Michaelmas Term; and this rule was moved in the course of the following term. [CROWDER, J.—The case of Meredith *v.* Gittens, 21 Law J., Q. B. 273, is clearly against you. There, the plaintiff, in April, 1851, recovered in a superior court less than 20*l.* In June, a summon for costs, under the 13 & 14 Vict. c. 61, s. 13, was taken out before a judge at chambers, who endorsed it "No order." In January, *1852, an application to [*449 the same effect was made to the court: and it was held that this could only be by way of appeal from the decision of the judge at chambers, and was therefore too late. Lord Campbell says: "We can only hear this as an appeal against the decision of a judge at chambers, which is brought before us on a suggestion that it is erroneous. In the present case, my Brother Coleridge made 'no order' in Trinity Term. Michaelmas Term elapses; and this rule is not moved for until the end of Hilary Term. It is a very wholesome rule, that all applications to review the decision of a judge at chambers should be made in the ensuing term." And Wightman, J., says: "There must be some limit within which applications to review the decision of a judge at chambers can be made. This must be treated as such an application; and I quite agree with the principles acted upon in Orchard *v.* Moxsy."](*a*)

WILLIAMS, J.—I am of opinion that this rule should be discharged. I am clearly of opinion that the terminus à quo is, the decision of the learned judge on the 21st of August. That was a complete and final decision; and, if the plaintiff wished to appeal from it, he was bound to come in the course of the following term. He, however, allows the whole of that and nearly the whole of the following term to elapse before coming to the court. We must abide by the rule. An appeal against the decision of a judge at chambers must be made in all cases not later than a term after.

*CROWDER, J.—I am of the same opinion. The cases of [*450 Orchard *v.* Moxsy, 2 Ellis & B. 206 (E. C. L. R. vol. 75), and Meredith *v.* Gittens, 21 L. J., Q. B. 273, seem to me to be conclusive,

(*a*) To make Meredith *v.* Gittens *strictly* in point with the present case, the first application there should have been for a "certificate" under the 13 & 14 Vict. c. 61, s. 12. Whether a motion for a rule under s. 13 could in any sense be said to be an appeal against the judge's exercise of discretion as to certifying under s. 12,—*quære?*

that an appeal against the decision of a judge is too late if a term has been allowed to elapse. Here, the decision of the judge took place on the 21st of August, 1857; and this rule was not moved until the 27th of January, 1858. The plaintiff could not place himself in a better position in respect of time by taking out another summons in November.

BYLES, J., concurring, Rule discharged, with costs.

BERWICK v. HORSFALL and Another. *April* 22.

Where a written instrument has been lost, and parol evidence of its contents has been received, its construction is still for the court, and not for the jury.

A., professing to act as the agent of B., the owner of a vessel in the African trade, under a power of attorney, during the voyage removed C. (the master) from the command, for alleged misconduct. At the termination of the voyage, the master (who had been permitted to remain on board) sued the owner *for wages*:—*Quære*, whether the act of A. in removing C. from the command of the vessel, was one which could be ratified by B. after the voyage was over?

THIS was an action by the plaintiff as captain of a vessel called the Cherokee, against the defendants as owners, for wages on a voyage to the coast of Africa and back, between the 18th of October, 1856, and the 30th of May, 1857, at the rate of 14*l.* per month.

The defendants pleaded, never indebted, payment, and a further plea that the plaintiff, whilst in command of the vessel, so grossly misconducted himself as to cause the defendants to dismiss him therefrom; upon which pleas issues were joined.

The cause was tried before Cresswell, J., at the second sitting at Guildhall in last Michaelmas Term, when the *following facts
*451] appeared in evidence:—The ship sailed for the coast of Africa in October, 1856, having on board, besides the captain, a surgeon, a chief mate, and a trading-master named Cheetham. Arrived on the coast, at Benin, Cheetham found that the master, from his habitual drunkenness and brutal treatment of the seamen, was wholly unfit to retain the command of the vessel; and accordingly he caused a court of inquiry to be held pursuant to the Merchant Shipping Act, 17 & 18 Vict. c. 104,(*a*) the result of which was, *that, by the unanimous
*452] judgmemt of the members of that court on the 13th of December,

(*a*) The 260th section enacts that "any officer in command of any ship of Her Majesty on any foreign station, or, in the absence of such officer, any consular officer, may summon a court, to be termed a 'Naval Court,' in the following cases, that is to say,—

"1. Whenever a complaint which appears to such officer to require immediate investigation is made to him by the master of any British ship, or by any certified mate, or by one or more of the seamen belonging to any such ship;

"2. Whenever the interest of the owner of any British ship or of the cargo of any such ship appears to such officer to require it;

"3. Whenever any British ship is wrecked or abandoned, or otherwise lost at or near the place where such officer may be, or whenever the crew or part of the crew of any British ship which has been wrecked, abandoned, or lost abroad, arrive at such place."

The 261st section enacts that "every such naval court as aforesaid shall consist of not more than five and not less than three members, of whom, if possible, one shall be an officer in the naval service of Her Majesty, not below the rank of lieutenant, one a consular officer, and one a master of a British merchant ship, and the rest shall be either officers in the naval service of Her Majesty, masters of British merchant ships, or British merchants; and such court may include the naval or consular officer summoning the same, but shall not include the master or

1856, the captain was pronounced incompetent to retain the command; and on the 26th he was formally dismissed therefrom by Cheetham, though suffered to remain on board the vessel. The plaintiff had been paid his wages up to the 26th of December.

Cheetham, who was called as a witness on the part of the defendants, stated that he was acting under a power of attorney from the owners, but that the document was lost. The learned judge, being satisfied that *sufficient search had been made for the missing document to let in secondary evidence of its contents, Cheetham stated that it [*453 gave him a general power over the property of the defendants, and authority to look after their interests, and to act as their representative or plenipotentiary in all that concerned the voyage. He further stated that it was within the scope of the general authority of a trading-master in the African coasting trade to transfer the captain and crew from one ship to another; and that, in many instances, trading-masters had dismissed captains.

The learned judge ruled, as a matter of law, that the plaintiff ceased to be captain from the date of the decision of the naval court by which he was superseded, and that he was not entitled to recover for wages subsequently to that day: and he left two questions to the jury,—first, whether they thought that Cheetham, the trading-master, had a precedent authority from the owners to supersede or dismiss the captain for misconduct,—secondly, whether Cheetham did, in point of fact, dismiss the captain on the 26th of December, 1856, and whether the owners ratified his act after the termination of the voyage.

The jury found that there was no proof to satisfy them that Cheetham had such precedent authority; but they found that Cheetham did in point of fact dismiss the captain on the 26th of December, 1856, and that the defendants subsequently ratified what he had done.

The learned judge thereupon directed a verdict to be entered for the defendants, ruling, notwithstanding the finding of the jury upon the first question, that Cheetham had such precedent authority, and that that was a matter for him to decide, and not for the jury.

consignee of the ship to which the parties complaining or complained against may belong; and the naval or consular officer in such court, if there is only one such officer in the court, or, if there is more than one, the naval or consular officer who, according to any regulations for settling their respective ranks for the time being in force, is of the highest rank, shall be the president of such court."

The 262d section enacts that "every such naval court shall hear and investigate the complaint brought before it, or the cause of the wreck or abandonment (as the case may be), and may for that purpose summon and compel the attendance of parties and witnesses, and administer oaths, and order the production of documents, and shall conduct the investigation in such manner as to give any person against whom any charge is made an opportunity of making a defence."

The 263d section enacts that "every such naval court may, after hearing the case, exercise the following powers, that is to say (inter alia),

"1. It may, if unanimous that the safety of the ship or crew, or the interests of the owner, absolutely requires it, supersede the master, and may appoint another person to act in his stead; but no such appointment shall be made without the consent of the consignee of the ship, if then at the place:

"And all orders duly made by any such court under the powers hereby given to it shall, in any subsequent legal proceedings, be deemed conclusive as to the rights of the parties."

And the 264th section enacts that "all orders made by any such naval court, shall, whenever practicable, be entered in the official log-book of the ship to which the parties to the proceedings before it belong, and shall be signed by the president of the court."

*454] *Brett*, in Michaelmas Term last, moved for a new *trial, on the ground of misdirection. The decision of the naval court did not amount to a sentence at all. The acts of these courts, from which there is no appeal, are to be construed most strictly. The act of Cheetham, therefore, in dismissing the plaintiff, was wholly unauthorized. The finding of the jury upon that point was conclusive. And it was an act which no subsequent ratification could legalize. It is a general principle that there can be no ratification of an act done on one's behalf by a stranger, if such ratification would affect the intervening rights of a third person. Thus, it has been held that there can be no subsequent ratification of a stoppage in transitu: Whitehead *v.* Anderson, 9 M. & W. 518, 526;† Nicholls *v.* Le Feuvre, 2 New Cases 81 (E. C. L. R. vol. 29), 2 Scott 146. [WILLES, J.,—That is because it affects the acquisition of a right by a third party. Thus, in Bird *v.* Brown, 4 Exch. 786,† C. & T., merchants at Liverpool, sent orders to I., a merchant at New York, to purchase for them certain goods, which were accordingly shipped by I. in five vessels bound to Liverpool, and consigned to C. & T., who, after the receipt of the goods by one of the vessels, stopped payment on the 7th of April, 1846. I. had drawn bills for the goods, partly on C. & T., and partly on R. & Co., with whom C. & T. had dealings. B. & Co., who were merchants at Liverpool, and who also had a house of business at New York, purchased there several of the bills, which were drawn at sixty days sight, and were dated, some on the 25th of March, and the rest on the 30th. On the 8th of May, a fiat in bankruptcy issued against C. & T. The four other vessels arrived at Liverpool respectively on the 3d, 5th, 6th, and 9th of May; and, immediately on the arrival of each, and whilst the transitus of the goods on board continued, B. & Co., on behalf of I., gave notice to the master and consignees of each ship, claiming to stop the goods

*455] *in transitu. B. & Co. were not the general agents of I., nor had they received from him any authority to make this stoppage. On the 11th of May, the assignees of C. & T. made a formal demand of the goods from the master and consignees of each of the four ships, at the same time tendering the freight; but they refused to deliver them, and on the same day delivered the whole to B. & Co. On the next day, the assignees made a formal demand of the goods from B. & Co., but they refused to deliver them up, claiming title under the stoppage in transitu. On the 28th of April, I. heard at New York that C. & T. had stopped payment; and, on the next day, he executed a power of attorney to H. of Liverpool, authorizing him to stop the goods in transitu. This was received by H. on the 13th of May, and he on that day adopted and confirmed the previous stoppage by B. & Co. I. afterwards adopted and ratified all that had been done both by H. and B. & Co. In trover by the assignees of C. & T. against B. & Co.,—it was held,—first, that there could be no valid stoppage in transitu after the formal demand of the goods by the assignees on the 11th of May, and the subsequent delivery of them to the defendants,—secondly, that the ratification of the stoppages by I. after the conversion by the defendants, had not the effect of altering retrospectively the ownership of the goods; and the reason assigned is, that the goods had already vested in the plaintiffs. WILLIAMS, J.—The ratification here did not take place until after the termination of the voyage.] In Right d. Fisher *v.* Cuthell,

5 East 491, a lease for twenty-one years contained a proviso that, in case either landlord or tenant, or their respective heirs and executors, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing under his or their respective hands, the term should cease: and it was held, that a notice *to determine the lease, signed by two of the three executors of the [*456 original lessor, to whom he had bequeathed the freehold as joint tenants, expressing the notice to be given *on behalf of themselves and the third executor*, was not good under the proviso, which required it to be given under the hands of all three; and that, the notice being such as the tenant was to act upon at the time, no subsequent recognition of the third executor would make it good by relation. The principle is well stated in Story on Agency, § 245, where it is said, that, "although the ratification of an unauthorized act of an agent acting without any authority, or beyond his authority, will in general bind the principal, not only as to his agent, but as to third persons, and give the ordinary rights and remedies both for and against him; yet this doctrine is to be received with some qualifications, or, rather, it is not universally applicable. Where an act is beneficial to the principal, and does not create an immediate right to have some other act or duty performed by a third person, but amounts simply to the assertion of a right on the part of the principal, there the rule seems generally applicable. Thus, for example, if a continual claim, or an entry to avoid a fine, or an entry for condition broken, is made by a person having no present authority, the principal may bring an action upon any of these acts, and his ratification or adoption of them will supply the want of an original authority." Again, in § 246, it is said: "On the other hand, if the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses for the non-performance of that act or duty, or would defeat a right or an estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it, so as *to bind such third person to the consequences. Thus, [*457 if a lease contains a condition that it may be determined by either party upon six months' notice, such notice, given by an unauthorized person for the landlord, although subsequently ratified and adopted by the latter, will not be a valid notice to determine the lease. The ground of this decision is, that it is a notice to defeat an estate, and the tenant is entitled to such notice as he can act upon with certainty at the time when he receives it, so that he may deliver up the possession at the end of six months, without being liable to further claims in respect to the remainder of the term. The case is distinguishable from that of an entry without authority for a condition broken; because, in the latter case, the third person's act is not to depend upon the validity of the entry at the time when it is made. The rule omnis ratihabitio retrotrahitur, et mandato priori æquiparatur, seems applicable only to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the mean time depend on the fact whether there be a ratification or not."

A rule nisi was granted "on the ground of misdirection, inasmuch as the act of Cheetham was without precedent authority from the owners, and was not an act which could in point of law be ratified by the de-

fendants after the voyage was over, so as to affect the plaintiff; and that the finding of the naval court was not a sentence superseding the plaintiff."

Edward James, Q. C., and *Quain*, now showed cause.—Whether the dismissal of the captain was wrongful or not, is quite immaterial in this form of action. The captain can only sue for wages where he has earned them: and here, from the date of his dismissal, on the 26th of December, 1856, the plaintiff ceased to exercise *the functions of captain. Cheetham was acting under a power of attorney, of the contents of which, the document being proved to have been lost, secondary evidence was allowed to be given. The learned judge told the jury that, upon Cheetham's evidence, he had charge of the property of the defendants, and authority to do all that was necessary for their benefit in relation thereto, and that that gave him power to deal with the master as he did,—holding as a matter of law, that the act of Cheetham was authorized; and, further, that if the owner ratified what he had done, they were responsible for it. There clearly was no misdirection in that; and the learned judge was fully warranted in directing the verdict to be entered according to his own view of the construction of the document. The general rule upon the subject of ratification is well stated by Tindal, C. J., in Wilson *v.* Tummon, 2 M. & G. 236, 242 (E. C. L. R. vol. 40), 6 Scott N. R. 894, 904, where that learned judge says: "That an act done *for another* by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous authority*. Such was the precise distinction taken in the Year Book, 7 H. 4, fo. 35,(*a*)—that, if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but, if he took it at the *time as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by Anderson, C. J., in Godbolt's Reports 109: 'If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, takes my goods, not as a bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot; for, once he was a trespasser, and his intent was manifest.'" The rule referred to in the sections quoted from Story on Agency does not apply to this case: neither do the cases as to stoppage in transitu, where the rights of third persons have intervened. And the notice to quit, or to determine a lease, is an exceptional case; because the tenant or lessee is entitled to know at the time it is given whether the notice is a valid and effectual notice or not.

Brett, in support of the rule.—The plaintiff, having in contemplation of law performed his contract, sues for wages. The answer set up, is,

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(*a*) H. 7 H. 4, fo. 24, pl. 1. See 6 M. & G. p. 239, n. (*a*) (E. C. L. R. vol. 46).

that he was for a justifiable cause removed from the command of the ship, and so earned no wages. The jury having found, upon a question left to them by the learned judge, that there was no precedent authority in Cheetham to remove the master from the command of the vessel, it is not competent to the defendants now to insist that there was. [CROWDER, J.—The question is, whether the evidence warranted what the learned judge laid down as law. He was quite justified in causing the verdict to be entered according to his own opinion of the construction of the authority.] The jury were fully warranted in the conclusion they came to, that *Cheetham had not authority to dismiss the captain. The office of the trading-master is well known in the [*460 African trade. He is the agent of the owners for the purposes of trade and barter; but he has no authority over the captain and crew. [CROWDER, J.—It was proved that many instances had occurred of such agents removing masters.] Assuming Cheetham to have had no precedent authority from the defendants, their subsequent ratification of what was done by him could not render it valid. The reasoning of Lord Ellenborough in Right d. Fisher *v.* Cuthell, 5 East 491, is equally applicable here.

CROWDER, J.—I am of opinion that this rule must be discharged. It appears to have been moved on the ground of misdirection; the alleged misdirection being, that the learned judge laid it down that the subsequent ratification by the defendant of the act of Cheetham in dismissing the plaintiff was equivalent to a precedent authority. But it appears from the notes of my Brother Cresswell that he told the jury that there was a precedent authority, and that Cheetham had acted upon that. I am of opinion that he was right. Cheetham stated that he had acted under a power of attorney, which was lost. He gave evidence of its contents. He stated that it gave him the entire charge of the property of the defendants, and that he was to look after their interests, and to act as their representative. Upon that the learned judge said, that, assuming the power of attorney given to Cheetham to have been as alleged, he ruled that Cheetham had authority to dismiss the captain. It seems to me that the learned judge was quite right in this. If the instrument had been before him, it would have been for the court to decide upon its meaning. It must be taken that the power of attorney did contain what Cheetham said it *contained: and the learned [*461 judge decided upon that assumption. He was requested to leave it to the jury. He said he was of opinion it was not for the jury, but, as he was pressed to do so, he would leave it to them. He, however, directed the verdict to be entered upon his own view of the matter. It seems to me, therefore, that the case is to be determined upon the assumption that there was a precedent authority for what was done by Cheetham; and therefore it is unnecessary to consider the other point, viz., whether this is a case in which there could have been a subsequent ratification. I am far from saying that it is not: it is enough to say that it is unnecessary to decide the point; because, if Cheetham had a precedent authority to act as owner, he had authority to dismiss the captain. On the 26th of December, 1856, therefore, the plaintiff was no longer captain: and, whether the owners had or had not a justification for his summary dismissal, still he cannot sue for wages as captain after that day. If the dismissal was wrongful, the plaintiff may sue the

owners for wrongfully dismissing him: if rightful, he is without remedy, nor ought he to have any. Upon this ground, therefore, it seems to me that this rule ought to be discharged. Looking at the notes of the learned judge, I do not perceive that any question was made as to the veracity of Cheetham: nor does it appear that there was any evidence offered to contradict him, or in any way to shake his credit.

WILLES, J.—I am entirely of the same opinion. The circumstance of the jury having pronounced an opinion upon it is quite immaterial when you come to look at what the question really was, viz., whether or not certain terms in a power of attorney gave Cheetham, the attorney, authority to remove the captain from the command of the ship. The *462] terms which that *instrument were stated to contain were obviously large enough for that purpose. He stated that he was the representative of the owners,—their plenipotentiary in the African trade. Seeing the distance the ship was from home, I do not think it a very far-fetched conclusion that Cheetham should have the extensive powers he professed to have. It turned out that the document which conferred that authority upon him was lost. But the fact of a document being lost, does not make the construction of its contents a question for the jury. The true rule is laid down in Neilson *v.* Harford, 8 M. & W. 806.† The construction of all written documents is for the court, and not for the jury. It was for the judge, therefore, to say whether or not there was such authority. He thought there was. The jury thought there was not. That, however, was quite immaterial, the question being solely for the court. The learned judge did not leave it to the jury to say whether or not they disbelieved Cheetham; nor was he asked to do so: and the objection now is, not that that was not left to the jury, but that, the jury having come to the conclusion that Cheetham had no authority, we ought to come to the same conclusion.

BYLES, J.—I fully agree with what has fallen from my learned Brothers, and for the same reasons; and therefore I deem it unnecessary to add anything. Rule discharged.

The construction of written instruments is in all cases matter of law for the Court: Levy *v.* Gadsly, 3 Cranch 180; Welsh *v.* Dusar, 3 Binney 337; Fowle *v.* Bigelow, 10 Massachusetts 384; Woodman *v.* Chesley, 39 Maine 45; Drew *v.* Fowle, 10 Foster 531; Harris *v.* Doe, 4 Blackford 369; Leviston *v.* Junction Railroad Co., 7 Indiana 597; Illinois Central Railroad Co., 17 Illinois 389; Emery *v.* Owings, 6 Gill 191; Kidd *v.* Cromwell, 17 Alabama 648. And so of verbal agreements, where their terms are clearly ascertained: Fosterman *v.* Parker, 10 Iredell 477; Rhodes *v.* Chesson, Busbee, N. C. 336.

END OF EASTER TERM.

IN THE EXCHEQUER CHAMBER.

EASTER VACATION, 21 VICTORIA.

SIMMONS *v.* TAYLOR, Public Officer of THE LONDON JOINT STOCK BANK. *May* 10.

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the statute 19 & 20 Vict. c. 25, which makes a "crossed check" payable only to or through a banker, applies to the state of the instrument *at the time of its presentment:* and therefore that the banker is justified in paying it otherwise than to or through another banker, if, when presented, it does not bear any crossing on the face of it.

Held also, that the crossing, though made by the drawer himself, forms no part of the check itself, and consequently that its erasure does not amount to a forgery.

THIS was an appeal against a decision of the Court of Common Pleas, in which that court held that the statute 19 & 20 Vict. c. 25, which makes a "crossed check" payable only to or through a banker, applies to the state of the instrument *at the time of its presentment*, and therefore that the banker upon whom a check is drawn is justified in paying it otherwise than through another banker, if, when presented, it does not bear any crossing on the face of it; and that the crossing forms no part of the check itself, and consequently its erasure does not amount to a forgery: vide 2 C. B. N. S. 528.

The short facts were these:—The plaintiff drew a check upon the London Joint Stock Bank, drawing across the face of it two parallel lines, and writing the words "& Co." at the end of the intervening space, and enclosed the draft so crossed in an envelope addressed to a third person. The check by some means fell into the hands of a stranger, who erased the crossing in such a manner, that, when presented at the bank, it was received and paid as an uncrossed check. No negligence was imputed to the bank: but the simple question was, whether, *it having once been a "crossed check,"* the bankers were justified in paying it otherwise than to or through a banker.

The case was argued in the Exchequer Chamber *before Wightman, J., Erle, J., Crompton, J., Bramwell, B., Watson, B., and Channell, B. [*464

Lush, Q. C. (with whom was *C. Addison*), for the appellant.—The effect of crossing a check was thus described by Parke, B., in Bellamy *v.* Majoribanks, 7 Exch. 389, 400,†—"The crossing a check cannot operate as an endorsement to the banker whose name is used, because it was not written with any intent to transfer the property in the check to him, and it wants the essential part of an endorsement, the delivery of the instrument to the endorsee. And we think it cannot well be supposed that the usage is to be considered as equivalent to a direction by the holder or drawer to the drawee not to pay to the bearer, but to a particular person only; for, then the check would be altered in a manner which would take it out of the exemption of the stamp-act, 55 G. 3, c. 184, Sched. part 1, which applies to checks payable to bearer only; and the bankers to whom it was addressed would not be bound to pay to the person named. We are therefore of opinion that a crossing the check with the name of a banker cannot have the effect of restricting its negotiability to such banker alone. To hold it to have this effect would be to render the instrument no longer a check." That case was followed

and confirmed by Carlon *v.* Ireland, 5 Ellis & B. 765. Such being the state of the law, the statute 19 & 20 Vict. c. 25 passes with the avowed object of amending it. It recites that "doubts have arisen as to the obligations of bankers with respect to cross-written drafts, and that it would conduce to the ease of commerce, the security of property, and *the prevention of crime*, if drawers or holders of drafts on bankers, payable to bearer or to order on demand, were enabled effectually to direct the payment of the same to be made only to or through some *banker:" and it then proceeds to enact, that, "in every case *465] where a draft on any banker made payable to bearer or to order on demand, bears on its face an addition in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." That must necessarily have the effect of controlling the operation and the negotiability of the draft. It is no longer payable to *any* bearer, but only to a bearer who is a banker. Payment to any other is a payment unauthorized by the drawer of the check. The obliteration of the words "& Co.," which formed an essential part of the instrument, is a forgery. [CROMPTON, J.—Then, the payment could not be made even "to or through a banker."] If the drawee pays the draft to or through a banker, he pursues the authority. [CROMPTON, J.—Not if it is a forgery. BRAMWELL, B.—The framer of the act was evidently ignorant of the law, and equally ignorant of the effect of the proposed alteration. Suppose I tell my banker that I never cross checks, and some one to whom I give a check chooses to write a banker's name across it,—what is to be the effect of that? Can the crossing thus put on it form part of the instrument? Surely, it can be no more than a caution to the banker.] It was that before the late act. [BRAMWELL, B.—Then it is a more emphatic caution now.] It is submitted that it is impossible to give any operation to the words of the statute, without holding that the crossing has the effect of controlling the word "bearer." The drawer knows that it is customary to cross checks: when he gives a check, therefore, he gives the bearer authority *466] to cross it. *The question is, did the bankers pay the money in pursuance of the authority of the drawer: Robarts *v.* Tucker, 16 Q. B. 560 (E. C. L. R. vol. 71). [CROMPTON, J.—How is the crossing to operate as a direction, unless the instrument bears it on the face of it at the time of presentment?] The erasure is a material alteration of the document, which amounts to a forgery. [BRAMWELL, B.—How can that be said to be a forgery of the instrument which restores it to the state in which it was originally issued? WIGHTMAN, J.—Suppose the endorsement were struck out by a bonâ fide holder,—what would be the consequence, if the banker refused to pay the draft? Or, suppose the name of a particular banker were struck out, leaving the check still a "crossed check?"] That might not be a material alteration. Here, the direction has been altogether disregarded: the payment was made to a person who was not a banker.

Bovill, Q. C. (with whom was *Archibald*), for the respondent, was not called upon.

WIGHTMAN, J.—We are all agreed that the judgment of the Court of

Common Pleas must be affirmed. The case turns upon the construction of the statute 19 & 20 Vict. c. 25, s. 1, the terms of which are sufficiently clear. The act professes to be "an act to amend the law relating to drafts on bankers." It begins with a recital that doubts have arisen as to the obligations of bankers with respect to cross-written drafts, and that it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers, payable to bearer or to order on demand, were enabled effectually to direct the payment of the same to be made only to or through some banker:" and it then proceeds to enact, that, "in every case where a draft on any banker, made *payable to bearer or to order on [*467 demand, *bears* across its face an addition in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." That clearly only gives the crossing the effect of a direction to the banker upon whom the draft is made, to pay it only to or through another banker, if it appears on the face of the instrument at the time of its presentment. This must be so from the very terms of the enactment; for, unless the draft bears the crossing on its face at the time of presentment, it cannot operate as a direction to the person to whom it is presented. Whether that direction is put on the instrument by the drawer himself or by any other person, if it bears the crossing on its face at the time of presentment, the banker who is to pay it can only do so to or through the banker named or to or through some other banker. If he sees the direction, he is bound to obey it. Here, it appears that the check, when presented for payment, had no direction at all upon the face of it, and therefore it was not a draft or order within the contemplation of the act. I entirely agree with the Court of Common Pleas in thinking that the crossing is a mere direction to the banker, and must, to be of any avail, appear upon the face of the draft when presented; and that the erasure of it would not constitute a forgery.

BRAMWELL, B.—Concurring, as I do entirely, in what has fallen from my Brother Wightman, I cannot refrain from remarking that this piece of legislation is an abortive attempt to perform the impossible feat of rendering a draft which upon the face of it purports to be payable to the bearer not payable to him. It is *a thing which cannot be done: [*468 the utmost that can be done, is, that which the law had already done before, viz., to make the crossing of the check or draft operate as a caution to the banker to use a greater degree of vigilance.(*a*) It may be that the statute has turned that which before was a mere caution to the banker, into an absolute direction to him not to pay the draft otherwise than to or through another banker, when the direction is put on by the drawer of the check himself. But, to hold that the direction forms part of the instrument itself, would be to attempt to perform the impossible feat I before alluded to, or to do that which would be equally impossible and inconsistent, viz., to say that the crossing should not affect the rights of the holder, and yet that the banker would not be

(*a*) *Quære*, what constitutes vigilance in a banker, who has no option to exercise as to whether he will or will not pay the draft when presented?

bound to pay the draft. It is manifest to my mind that a bonâ fide holder of this check would have a remedy against the drawer upon it. It is plain that the negotiability of the instrument is not and never was affected by the crossing. I think the crossing operates as a private direction to the banker, and that, if made by the customer, the banker would be liable to him for disobeying it,—the crossing by the customer being tantamount to a direction to the banker to pay the draft only to or through another banker. But, if the crossing is put on by some one other than the maker of the draft, I have a difficulty in seeing how the banker could be held liable for not obeying it. Whoever drew this act must have seen the difficulty, or rather the impossibility, of making the crossing part of the instrument itself, and at the same time preserving the negotiable character of the draft.

The rest of the court concurring,

Appeal dismissed, with costs.

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*469] *POWIS v. BUTLER and Another, Executors of CHARLES WALTON, deceased. *May* 11.

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the executors of one whose name has since his decease been inserted in the last filed memorial or return (under the 7 & 8 Vict. c. 113, s. 16), are not liable to execution on a judgment against the company, although the testator was properly returned as a shareholder in previous memorials.

Error upon a judgment of the Court of Common Pleas on a special case,—the question being whether, under the circumstances stated in the case, the plaintiff was entitled to issue execution against the defendants as executors of one Charles Walton, deceased, upon a judgment obtained by him against the official manager of the Royal British Bank on the 2d of December, 1857, under the 7 & 8 Vict. c. 113.

It appeared on the case that Walton, the testator, died on the 16th of April, 1856, and that his name appeared in the memorial (the last) filed by the proper officer of the company, pursuant to s. 16, in June, 1856. The court below held that the executors were not liable: vide 3 C. B. N. S. 645 (E. C. L. R. vol. 91).

The case was now argued before Wightman, J., Erle, J., Crompton, J., Bramwell, B., Watson, B., and Channell, B.

Beasley, for the plaintiff in error.—Looking at the various sections of the statute,(*a*) and especially at the 6th and 7th, by which the shareholders for the time being, *and their several executors, administrators*, successors, and assigns, are incorporated, and at the 21st, which enacts that "the persons whose names shall appear from time to time in the then last-delivered memorial, *and their legal representatives*, shall be liable to all legal proceedings under this act as existing shareholders of
*470] the company, and shall be entitled to be *reimbursed, as such existing shareholders only, out of the funds or property of the company, for all losses sustained in consequence thereof," the defendants, as executors of a person whose name appears on the last filed

(*a*) The learned counsel referred to and commented at great length upon the following sections, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, and 26.

memorial, are clearly liable. [WIGHTMAN, J.—The man was *dead*, when the memorial was filed.] The creditor can only look at the memorial as filed. The courts have already decided that the party against whom execution is sought need not be de facto a shareholder: Fry *v.* Russell, 3 C. B. N. S. 665 (E. C. L. R. vol. 91). [WIGHTMAN, J.—The defendants are charged in their representative character. It is incumbent on the plaintiff, therefore, to show that the person whom they represent was liable.] He is made so by the express language of the 21st section. [CROMPTON, J.—He had altogether ceased to be a "person" when the memorial was filed.] The statute makes the register conclusive evidence as to who are existing shareholders. [WIGHTMAN, J.—The statute must receive a fair and reasonable construction.] In Williams on Executors, 5th edit. 1583, it is said: "With respect to the liabilities of executors of shareholders in public companies, where the deed of settlement provides that the company shall continue for a certain term of years, and that the shares of a deceased proprietor shall belong to his personal representatives, but that they shall not be deemed proprietors until they are duly admitted, and have executed the deed of settlement, or done some other act, and then, and not before, they are to become proprietors and receive the dividends, it is established, that, on the death of a shareholder, his estate, and consequently his executors or administrators, in their representative capacity, continue liable until a new personal liability has been created pursuant to the deed;" citing In re Northern Coal Mining Company, 13 Beavan 133. In that case, by a deed of settlement of a public *company, it was provided that the company was to continue forty years, "that the shares of deceased pro- [*471 prietors should belong to their personal representatives," but that executors should never be deemed proprietors until they should be duly admitted proprietors, on approval by the directors, and had executed the deed, &c.," and then, but not before, they "were to become proprietors, and entitled to receive the dividends: and it was held, that, upon the death of a proprietor, his estate continued liable, until a new personal liability had been created pursuant to the deed. The master of the rolls (Lord Langdale) there says: The shares do not survive as in ordinary cases, and because they do not survive, but are expressly declared to belong to the personal estate of the deceased proprietor, they must, I think, belong to it, or form part of it, subject to the incidents attending the possession of a portion of the capital or assets of the partnership under the management of the directors, as provided for by the deed; and, if profits or losses arise, I think that a right to a share of the profits, and with that a liability to contribute a share of the losses, are necessarily incident to the shares themselves, or to the right to the shares." The Lords Justices have held that executors are liable as contributories under the winding-up acts. [CROMPTON, J.—That is a totally different matter.]

Phipson, contrà, was not called upon.

WIGHTMAN, J.—I am of opinion that the judgment of the Court of Common Pleas was right, and must be affirmed. The question turns upon the construction to be put upon the 21st section of the 7 & 8 Vict. c. 113, which enacts that "the persons whose names shall appear from time to time in the then last-delivered *memorial, and their legal [*472 representatives, shall be liable to all legal proceedings under this

act, *as existing shareholders of the company*, and shall be entitled to be reimbursed, as such existing shareholders only, out of the funds or property of the company, for all losses sustained in consequence thereof." In the present case, it may have been the duty of the officer of the company to deliver a memorial between the 28th of February and the 25th of March: but it was not filed until June; and, before the document was filed and became effective as a memorial, the individual whose representatives are now sought to be charged died. The question is, whether, under these circumstances, the deceased comes within the description in s. 21, of "a person whose name appears in the memorial." No doubt the name was on the last-delivered memorial; but it was not, within the fair and reasonable construction of the act, the name of a person,—which must mean a living person. That seems to me to dispose of the whole matter. The defendants here are sued in their representative character. To render them liable in that character, it must be shown that the person whom they represent was a person whose name appears on the last-delivered memorial. Being then dead, he was not a person whose name could properly be upon the memorial. I therefore think that the judgment of the Court of Common Pleas was right, and must be affirmed.

Bramwell, B.—I am entirely of the same opinion, and shall only add a word or two to what has fallen from my Brother Wightman. Looking at the language of the 9th and 10th sections of the 7 & 8 Vict. c. 113, the meaning of the 21st section seems to me to be very obvious. The 9th section enacts that every judgment, decree, or order of any *473] court *of justice in any proceeding against the company, may be lawfully executed against, and shall have the like effect on, the property and effects of the company, and also, subject to the provisions hereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding." I do not find it provided in any part of the statute that the judgment is to have a greater effect than that. Now, a dead man could not be a party to the proceeding. The 10th section enacts that "it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against the company, to be issued against the property and effects of the company; and, if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to have execution in satisfaction of such judgment, decree, or order against the person, property, and effects of any shareholder, or, in default of obtaining satisfaction of such judgment, decree, or order from any shareholder, against the person, property, and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose: provided that no person having ceased to be a shareholder of the company shall be liable for the payment of any debt for which any such judgment, decree, or order, shall have been so obtained, for which he would not have been liable *as a partner* in case a suit had been originally brought against him for the same," &c. A dead man could not be liable *as a partner*. Then comes the 21st section, which enacts that "the *persons* whose names shall appear from time to time in the then last-delivered memorial, and their legal representatives,

shall be liable to all legal *proceedings under this act *as existing shareholders* of the company," &c. That is to say, they are the persons to whom recourse is to be had in the first instance to obtain satisfaction of the judgment. The 21st section was not intended to make any person liable who was not otherwise liable; but to describe what persons are within the one class and what within another. [*474

The rest of the court concurring, Judgment affirmed.

END OF EASTER VACATION.

CASES

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS,

AND IN THE

EXCHEQUER CHAMBER,

IN

Trinity Term,

XXI. VICTORIA. 1858.

The Judges who usually sat in Banc in this Term, were:

COCKBURN, C. J.	WILLES, J.
WILLIAMS, J.	BYLES, J.

MEMORANDA.

IN the course of the last Vacation, Charles Petersdorff, Esq., of the Inner Temple, John Cross, Esq., of Gray's Inn and the Middle Temple, John Tozer, Esq., of Lincoln's Inn, and William Payne, Esq., of Gray's Inn, were respectively called to the degree of the Coif.

They gave rings with the following mottoes:—

Serjt. Petersdorff,—"Nec mora nec requies."

Serjt. Cross,—"In Cruce fido."

Serjt. Tozer,—"Et tenui telas, discreverat auro."

Serjt. Payne,—"Reverentia legum."

*NOTMAN and Another *v.* THE ANCHOR ASSURANCE COMPANY. *June* 4. [*476

On the 23d of June, 1853, the plaintiffs (in Glasgow) effected a policy for 2,000*l.* upon the life of A., one of the conditions of the insurance being that the policy should be void if A. should go beyond the limits of Europe without leave of the directors. The premiums were regularly paid each half-year down to the 22d of December, 1857.

One of the plaintiffs, who was the agent at Glasgow of the company, in the confidential report made to them on the 18th of June, 1853, stated,—"A. has for sixteen years past resided principally at Belize, Honduras: his health has not in any way suffered: *he intends returning there for a few years in about a month:*" and on the 20th he wrote to them, "*A. proceeds to Belize about the end of this month.*"

On the back of the policy, and of even date therewith, was the following memorandum:—"The life assured under this policy being about to proceed to and reside at Belize, in the state of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid along with the premium payable on this policy as within expressed."

The extra premium for one year's foreign residence was paid on the 23d of June, 1853, but A. did not in fact proceed to Belize until the 9th of June, 1856, arriving there "about the middle or latter end of August." He died there on the 13th of August, 1857, within a year of his arrival at Belize:—

Held, that the permission to reside "for one year" at Belize, was not limited to any particular year, and consequently that the assured were entitled to recover the sum insured.

THIS was an action brought by the plaintiffs, suing for the benefit of their assignee, Archibald Livingston, against the defendants, for the recovery of 2000*l.*, the amount secured by a policy of assurance effected by the plaintiffs with the defendants on the life of one Michael Finlayson Stirling, deceased, or of such sum for the return of extra premium or other premiums as they might be entitled to recover; and, by the consent of the parties, and by a judge's order, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court, without pleadings:—

The plaintiffs, at the time of effecting the policy of assurance hereinafter mentioned, were merchants, of Glasgow, trading in copartnership with one William Skinner, since deceased, under the name and firm of Skinner, Notman & Co.: and the defendants carried on the business of an assurance company for fire and life, at 67, Cheapside, London.

Mr. M. F. Stirling, deceased, the person on whose life the policy was effected, was a merchant at Glasgow; and the plaintiffs and Skinner, being interested in the *life of Stirling, effected with the defendants, on the 23d of June, 1853, a policy of assurance on his [*465 life, for 2000*l.*; which policy of assurance is in the words and figures following:—

"Life policy with bonus.

"No. 1845. Sum assured, 2000*l.*

"Anchor Assurance Company, for Fire and Life, 67, Cheapside, London.

"Half-yearly premium, 27*l.* 11*s.* 8*d.*

"Whereas Messrs. Skinner, Notman & Co., of, &c., merchants, hereinafter called the assured, have proposed to effect an assurance with the Anchor Assurance Company in the sum of 2000*l.* upon and for the whole continuance of the life of Michael Finlayson Stirling, of No. 73, Villafield Place, Glasgow, aforesaid, merchant, and, as the basis of this

assurance, the said assured hath delivered at the office of the said company a declaration in writing, signed by the assured, and bearing date the 18th of June, 1853:

"And whereas the said assured has paid to the said company the sum of 27*l.* 11*s.* 8*d.* as a premium or consideration of this assurance for six calendar months until the 22d of December, 1853.

"Now this policy witnesseth, that, if the said M. F. Stirling shall die before or upon the 22d of December, 1853, or shall live beyond that day, and the said assured or their assigns shall, on or before that day, and on or before the 22d of June, and the 22d of December, in each and every succeeding year during the continuance of this assurance, pay to the said company the premium of 27*l.* 11*s.* 8*d.*, then the funds and other property of the said company shall, according to the provisions of the deed of settlement of the said company, be subject and liable to pay to the said assured, their executors, administrators, or assigns, within three calendar
*466] months after satisfactory proof of the death of *the said M. F. Stirling, and after such other information and evidence respecting the time, cause, or manner of such death as the directors may reasonably require, shall have been received at the principal office of the said company, the sum of 2000*l.* of lawful money of Great Britain, together with such further sum or sums of money (if any) as, according to the rules and regulations for the time being of the said company, shall be apportioned and payable as and by way of bonus or addition to the sum hereby assured.

"Provided always that this policy, and the assurance hereby effected, are and shall be subject to the several conditions printed on the back hereof, so far as the same are or can be applicable: and such conditions shall be considered as forming part of this policy.

"Given under the hands of three of the directors, and sealed with the common seal of the said company, this 23d day of June, 1853.

(Signed) "FREDERICK JAMES SMITH.
"J. W. WESTHEINER.
"JOHN A. DALBY."

The conditions printed on the back of the policy were in the words and figures following:—

"Anchor Assurance Company.
"Conditions of life assurance.

"1st. The premium, if payable annually, must be paid within thirty days, if half-yearly, within fifteen days, and, if quarterly, within seven days, next after the day or respective days on which the same shall have become due, or the policy will be void, and cannot afterwards be revived, except at the discretion and with the special permission of the board of directors, and upon satisfactory proof that the person whose life is assured continues in good health. The directors do not ordinarily revive policies under any circumstances after the lapse of twelve calendar
*467] months from the time *of their becoming forfeited; nor at any time, except on payment of the premiums due, and interest at five per cent. per annum.

"2d. If the premium be made payable half-yearly or quarterly, and the person upon whose life the assurance is effected die before the whole amount of premium for the current year of the policy shall have been paid, the remainder thereof shall be deducted from the sum assured.

"3d. Every policy effected by a person on his own life, or on his own and any other life or lives jointly, who shall die by his own hands, whether felo-de-se or otherwise, shall be void, except so far as any other person shall have acquired a bonâ fide interest therein by assignment or by legal or equitable lien, provided such assignment or security shall have existed, and notice thereof shall have been given to the company, not less than three calendar months before the death.

"4th. If any statement or allegation contained in any declaration or document mentioned or recited in the policy be untrue; or, if the assurance shall have been made through or in consequence of any misrepresentation, concealment, or fraud; or, in case the person upon whose life the assurance is effected (or either of such persons if more than one) *shall go beyond the limits of Europe*, or shall die on the seas, except in passing from one part of the United Kingdom to another, or in passing in times of peace in decked vessels from any European port to any other European port; or, being or becoming a military or naval man, shall enter into actual service, without the license of the board of directors previously obtained; or shall die by duelling or the hands of justice,—this policy shall be void.

"5th. If, for any cause whatever, the policy becomes void, all moneys paid in respect thereof will be forfeited to the company.

*"6th. The capital stock of 1,000,000*l.*, and other the stock, securities, funds, and property of the said company remaining at [*468 the time of any claim or demand made unapplied and undisposed of, and inapplicable to prior claims or demands, shall alone be liable to answer and make good all claims and demands upon the said company, or otherwise, under or by virtue of this policy: and no director, officer, or shareholder of the said company, his heirs, executors, or administrators, shall, by reason of this policy, be in anywise individually or personally liable or subject to any such claims or demands, or to be sued in respect thereof: nor shall any director or other shareholder of the company be in anywise charged by reason thereof beyond the amount unpaid of his shares in the said capital stock, nor longer than he shall retain the same shares."

In addition to the above-recited conditions, a memorandum, in the words and figures following, was, by authority of the board of directors, endorsed on the said policy of assurance:—

"Memorandum.

"Anchor Assurance Office, 67, Cheapside.

"June 23d, 1853.

"The life assured under this policy being about to proceed to and reside at Belize, in the state of Honduras, and an extra premium of 20 guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid along with the premium payable on this policy as within expressed.

"By order of the board of directors,

(Signed) "THOMAS BELL, secretary."

The following is a copy of the declaration which was, and in the policy is stated to have been, the basis of this assurance:—

*469] *PROPOSAL FOR A LIFE ASSURANCE.

Questions.	*Answers.*
1. Christian and surname of the person whose life is proposed to be assured? . . .	Michael Finlayson Stirling.
2. Present residence and profession or occupation?	Glasgow, 73, Villafield Place, or Belize, Honduras, Merchant.
3. Whether married or single?	Married.
4. Place and date of birth? . . . . . What evidence of age will be produced?	Glasgow, 30th March, 1820. Register of birth and baptism.
5. Age next birth-day?	Thirty-four years.
6. If had the small-pox or undergone vaccination (cow-pox)?	No. Vaccinated by Dr. Hunter.
7. If had any particular determination of blood to the head, or suffered from apoplexy, palsy, epileptic or other fits, or from insanity?	Never.
8. If suffered from habitual cough, spitting of blood, asthma, inflammation or other disease of the lungs, or from disease of the heart?	Never.
9. If suffered from inflammation or other disease of the bowels, disease of the liver, of the kidneys or other urinary organs? . . .	Never.
10. If suffered from dropsy, fistula, rupture, gout, rheumatism, or any other disease? . .	Never.
11. If ever met with any accident or serious personal injury, state its nature, and how long since it occurred?	Never.
12. If ever resided abroad? If yes, state when, where, and how long, and whether the party's health suffered from such residence?	Sixteen years in the West Indies: been in Glasgow six months. Health has not suffered in any way whatever.
13. If of sober and temperate habits? . .	Temperate.
14. If now and ordinarily enjoying good health?	Very good.
15. Is there any circumstance connected with the health, habits, or otherwise, with which the directors ought to be acquainted, or which would render an assurance on the life more than usually hazardous?	None.
16. Whether the party's parents are alive, and what are their respective ages. If dead, at what age they died, and of what diseases?	Ages. Alive. *Father,* *Mother,* — Ages. Dead. *Father,* 44 Inflammation. *Mother,* 58 Constipation.
17. Whether any and which of the party's near relations have died of consumption, or other pulmonary complaint?	None whatever.
18. What was the original number of the party's brothers and sisters? How many of them are dead, and at what ages did they die?	Original number. No. eleven *Brothers* Six *Sisters* Five — Dead. Three: two died in infancy.
19. Whether the party's life has ever been proposed for assurance at any other and what office or offices, and when, and what was the result?	Never.
20. Name and residence of ordinary medical attendant, and how long known to him? . . If received medical advice from any other person be so good as state it.	Never had any regular medical attendant.
21. Name, residence, and profession of an intimate friend, not being a relative, nor interested in the assurance, and how long known to him.	Dr. Hunter, Sanchuhall St. Dr. James Miller, Sanchuhall St. Has known him for 25 years.

22. Christian and surname, present residence, and profession or occupation of the person on whose account and in whose favour the policy is to be granted.	Messrs. Skinner, Notman & Co., Merchants, Exchange Square, Glasgow.
23. Sum to be assured, and term or nature of the assurance	Two thousand pounds.
24. Whether with or without bonus? . . .	With bonus.
Premiums to be paid yearly, or half-yearly?	Half-yearly.
Signature of party whose life is to be assured.	M. F. STIRLING.

We hereby propose to effect the above-mentioned assurance with the Anchor Assurance Company, and declare that the above answers are true and faithful in all respects, and we agree that this declaration shall be the basis of the assurance to be granted by the said company. And we declare that we have not intentionally withheld any information which is calculated to influence the decision of the directors as to the eligibility for assurance of the life proposed; and we agree, that, if any statement or allegation contained herein, or in the answers above given, be untrue, or if the assurance shall have been made through, or in consequence of, any misrepresentation, concealment, or fraud, the policy shall be void, and all moneys paid in respect thereof be forfeited to the company, and that such policy shall be subject to a condition to that effect, and to other the conditions usually inserted in the life policies of the said company.

Dated this 18th June, 1853. (Signed) SKINNER, NOTMAN, & Co.

Afterwards, on the 11th day of December, 1854, the said policy of assurance, with the said memorandum thereon, was duly assigned by the plaintiffs, and delivered over to one Archibald Livingston, a writer, of Glasgow, for valuable consideration; and a certified copy of such assignment was lodged with the defendants; and such assignment was thereupon duly marked and entered in the books of the defendants.

*The following premiums have been paid to the defendants in respect of the said policy of assurance,—for the half-year ending [*471 the 22d of December, 1853, 27*l.* 11*s.* 8*d.*,—for the half-year ending the 22d of June, 1854, 27*l.* 11*s.* 8*d.*,—for the half-year ending the 22d of December, 1854, 27*l.* 11*s.* 8*d.*,—for the half-year ending the 22d of June, 1855, 27*l.* 11*s.* 8*d.*,—for the half-year ending the 22d of December, 1855, 27*l.* 11*s.* 8*d.*,—for the half-year ending the 22d of June, 1856, 27*l.* 11*s.* 8*d.*,—for the half-year ending the 22d of December, 1856, 27*l.* 11*s.* 8*d.*,—for the half-year ending the 22d of June, 1857, 27*l.* 11*s.* 8*d.*,—and, for the half-year ending the 22d of December, 1857, 27*l.* 11*s.* 8*d.* And, in addition to the above payments, a further payment of 20 guineas was made to the defendants on the 23d of June, 1853, for permission to the life assured to proceed to and reside at Belize aforesaid, according to the memorandum of that date endorsed on the policy as aforesaid; but no other payment of such additional premium has ever been made to the defendants.

The plaintiff, John Notman, was, before and at the time the policy was effected, the agent at Glasgow of the defendants, and through him the policy was proposed and effected. In a report made by him as such agent to the defendants on the 18th of June, 1853 (a copy of which report accompanied and formed part of the case), the following question put by the defendants to the said John Notman is contained, viz., "Are you possessed of any information, or acquainted with any and what fact or circumstance, connected with the actual state of health or habits of the life proposed to be assured, which in reason and fairness may appear to be material, and which therefore ought to be communicated to the directors? If you are, state it fully." The said John Notman made

*472] the following answer in *the said report to the said question:—"Mr. Stirling has for sixteen years past resided principally in Belize, Honduras: his health has not in any way suffered: he intends returning there for a few years, in about a month."

In a letter addressed by the said John Notman to the defendants on the 20th of the same month of June, and received by them on the 21st, he makes the following statement with respect to the said Mr. Stirling:—"Mr. Stirling proceeds to Belize about the end of this month." The said Michael Finlayson Stirling did not proceed to Belize until on or about the 9th of June, 1856, where he arrived about the middle or latter end of August, 1856; and continued there from that time until his death.

In the month of May, 1857, he caught a cold, which brought on an attack of jaundice and diseased liver, of which he died on the 13th of August, 1857, within the space of a year from his arrival at Belize: and he was buried at Belize aforesaid on the same day.

The fact of the death of the said Michael Finlayson Stirling was published in the obituary of a Glasgow newspaper in the course of the month of September last, from which source the plaintiffs and the said Archibald Livingston, the assignee of the said policy, first learnt that the said Michael Finlayson Stirling had left this country, and first learnt that he was dead.

Upon becoming acquainted with the fact of the decease of the said Michael Finlayson Stirling, the said Archibald Livingston communicated with the defendants; and the following correspondence took place:—

"Policy No. 1845. 2000*l.*

"Michael Finlayson Stirling,

"Glasgow, 22d September, 1857.

*473] "We beg to intimate that this party died at Belize, *Honduras, on the 13th ult., and will thank you to forward to us the necessary forms for proving the death, &c. Of course you are aware that our Mr. Livingston is in right of this policy under a regular deed of assignment duly intimated to your office.

(Signed) "LIVINGSTON & GARDINER."

The following is a copy of the letter of the managing director of the Anchor Assurance Company, in reply:—

"Anchor Assurance Company,

"67, Cheapside, London. 23d Sept. 1857.

"Gentlemen,—In reply to your letter of the 22d instant, intimating the death of Michael Finlayson Stirling, assured with this company under policy 1845, and which death took place at Belize, Honduras, I beg to refer you to the conditions of the policy, and to intimate to you, that, inasmuch as the assured had gone abroad without due notice thereof and payment to this company of the extra premiums, as in such case is always done, the policy, as a necessary consequence, has become forfeited, and the company is not liable for any payment in respect of it. "THOMAS CAVE, Managing Director."

To this reply Archibald Livingston made the following answer:—

"Glasgow, 25th Sept. 1857.

"Re Stirling's policy, 1845.

"Your letter of the 23d inst. to Messrs. Livingston & Gardiner is to

hand; and, before placing myself in anything like a hostile attitude with the Anchor Assurance Company, I wish to state two things by way of explanation regarding the claim which has emerged under this policy,—1. The assured left this country unknown to me, and therefore I could not intimate to the office what I did not know myself. The first and only notice of the change of residence received by me was *that contained in the newspaper obituary of last week announcing the death,—2. By an endorsation on the policy, under date [*474 the 23d of June, 1853, liberty is granted to the assured to proceed to and reside at Belize, Honduras, upon payment of an extra premium of 20 guineas for one year's residence there, and for so long thereafter as the like extra premium shall from time to time be paid. Now, as I have just learned, the assured did not then go to Belize, and only proceeded thither last year, and died within a twelvemonth of his landing there, the company have been paid the extra premium fixed by themselves for the whole period of foreign residence exigible under the policy and endorsation thereon.

"Having made you aware of these facts, I now wish to know whether the claim is to be admitted on production of the usual certificates, which I shall at once procure on being furnished with the office forms.

(Signed) "ARCHIBALD LIVINGSTON."

Subsequently to this, the following letters passed between the said Archibald Livingston and the defendants:—

"London, 26th September, 1857.

"Archibald Livingston, Esq.

"Sir,—In the absence of Mr. Cave, I have to acknowledge receipt of your letter of yesterday's date. The contingency of Mr. Stirling's leaving the country without your knowledge is one that you took upon yourself when you purchased the policy. The license given in June, 1853, expired in June, 1854, in consequence of the extra premium not having been paid from time to time, as required by the license.

"Per pro. THOMAS CAVE, Managing Director.
"J. H. WOOD."

"Glasgow, 28th Sept. 1857.

"Policy 1845 (Stirling.)

"Sir,—Your letter of the 26th instant has just been *received. [*475 As I wish to have the decision of your board on the claim which has arisen under the policy, I will thank you to lay the correspondence which has passed on the subject before the directors at their first meeting, and let me know the result. "ARCHIBALD LIVINGSTON."

"London, Oct. 1st, 1857.

"Policy 1845.

Sir,—I brought your letters, re this death, before the board at their meeting this day, when I was instructed to inform you that they cannot admit the claim. "Per pro. THOMAS CAVE, Managing Director.
"J. H. WOOD."

The question for the opinion of the court, is, whether the plaintiffs are entitled to recover the sum assured by the said policy of assurance, or any and what sum for the return of extra premium or other premiums, under the above circumstances.

If the court shall be of opinion in the affirmative, then judgment is to be entered up for the plaintiffs for 2000*l.* and costs, or such other sum as the court may direct: but, if the court shall be of opinion in the negative, then judgment of nolle prosequi, with costs of defence, shall be entered up for the defendants.

James Wilde, Q. C. (with whom was *John Thompson*), for the plaintiffs.(*a*)—The question is, whether by *the terms of the memo- *476] randum, the party whose life was insured was bound to avail himself of the permission thereby given him at once, or whether, having paid a premium for a year's residence, he was at liberty to go at any period, and reside at the place indicated for one year, in consideration of the 20 guineas extra premium. [COCKBURN, C. J.—The amount of the premium is calculated with reference to the man's age and state of health at the time of the bargain.] The language of the memorandum is general. The liberty is granted for "a year's residence at Belize,"—to commence, of course, from the time the party first lands there. It nowhere appears that the sum charged for the extra risk is fixed with reference to the then age of the party. He is to be at liberty to reside at Belize, for one year, go when he may, and for so long thereafter,—after the expiration of that one year,—as the extra premium shall from time to time be paid. The language of the policy and of the memorandum is that of the company, and therefore is to be construed, if there be any ambiguity in it, most strongly against them: "Verba chartarum fortius accipiuntur contrà proferentem." In Broom's Legal Maxims, 3d edit. 529, it is said: "It is a general rule, that the words in a deed are to be construed most strongly contrà proferentem,—regard being had, however, to the apparent intention of the parties, as collected from the whole context of the instrument; for, as observed by Sir W. Blackstone, the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their *477] words, and hereby all manner of deceit in *any grant is avoided; for, men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. Moreover, the adoption of this rule puts an end to many questions and doubts which would otherwise arise as to the meaning and intention of the parties, which, in the absence of it, might be differently construed by different judges; and it tends to quiet possession, by taking acts and conveyances executed beneficially for the grantees and possessors." The same rule of construction is applied in the case of guarantees. Thus, in Hargrave *v.* Smee, 6 Bing. 244 (E. C. L. R. vol. 19), 3 M. & P. 573, Tindal, C. J., says: "The question is, what is the fair meaning to be collected from the language used in this guarantee. The words employed are the words of the defendant in this cause, and there is no reason for putting on a guarantee a construction different from

(*a*) The points marked for argument on the part of the plaintiffs, were,—

"1. That the license of the board of directors to the life assured, to reside at Belize, endorsed upon the policy, is for one year's residence at Belize unconditionally, and that the extra premium for such risk having been paid, and the life assured having died at Belize within one year of his arrival and residence there, the plaintiffs are entitled to recover the sum assured.

"2. In the event of the court deciding that the plaintiffs are not entitled to recover the sum assured, that they are entitled to recover the extra premium and such ordinary premiums as may have been paid after the time from which it may be said that the policy became forfeited, and ceased to exist."

that which the court puts on any other instrument. With regard to other instruments, the rule is, that, if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself." And in Mayer *v.* Isaac, 6 M. & W. 605, 612,† Alderson, B., says: "Undoubtedly, the generally received principle of law is, that the party who makes any instrument, should take care so to express the amount of his own liability as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party." The subject underwent discussion recently in the House of Lords, in Anderson *v.* Fitzgerald, 4 House of Lords Cases 484, where Lord St. Leonard's says: "It [the policy] is of course prepared by the *company, and if therefore there should be any ambiguity in it, must be taken, according to law, more strongly against the person who prepared it." Assuming, therefore,—though it is not admitted,—that there is any ambiguity here, the same principle of construction must be applied to this instrument. Then, if the policy be void, the plaintiff will be entitled at all events to recover back the 20 guineas extra premium, and the three half-years' premium paid since the time when the policy so became void. [*478

Bovill, Q. C. (with whom was *R. E. Turner*), for the defendants.(*a*)—The obvious intention of the parties was that the residence at Belize should commence immediately, or within a reasonable time. This is plain from the circumstance of the extra premium being declared to be payable at the same time as the other *premiums; and these are payable half-yearly. The application is for permission to "proceed to, and reside at," Belize. The words "for one year" have reference to the payment of the premium. The amount of premium for the foreign residence would necessarily vary according to the age of the party at the time of its commencement. In Jenk. Cent. 301, it is said, —"A lease is made for twenty-one years, without mentioning the time of its commencement: it shall begin immediately." [COCKBURN, C. J.—Every deed dates from the time of its delivery.] No one can fairly doubt the meaning of the parties here: the season of arrival would be an important ingredient in the consideration of the premium: and here the parties were evidently dealing with a view to an insurance of a person upon the eve of starting. [COCKBURN, C. J.—The company [*479

(*a*) The points marked for argument on the part of the defendants, were as follows:—

"1. That the permission given by the defendants to the said Michael Finlayson Stirling to proceed to and reside at Belize, as stated in the memorandum, had expired before the said Michael Finlayson Stirling had left England, and that therefore the policy became forfeited by his departure for Belize in June, 1856.

"2. That the permission given by the memorandum was, a permission to proceed to Belize within a short time after the 23d day of June, 1853,—at all events, before the 9th day of June, 1856.

"3. That the language of the memorandum itself, and of the policy, and also the other documents which form part of the case, show that such is the construction to be put upon the memorandum; and that the said Michael Finlayson Stirling was not at liberty, under such permission, to proceed to and reside at Belize at any time after the 23d of June, 1853.

"4. That, the policy having become forfeited by the departure of the said Michael Finlayson Stirling to Belize in 1856, all sums paid to the office by way of premium, extra premium, or otherwise, are, under the terms of the policy, also forfeited."

might have placed the matter beyond doubt, by inserting the date from which the year's residence was to commence.] If the argument on the other side be tenable, the party might have gone to Belize for a year's residence twenty years after the date of the memorandum. [COCKBURN, C. J.—Perhaps that would not have been very unreasonable, seeing that the company would have had the benefit of the ordinary premiums for all the intervening space.] The whole bargain was based on the assumption that Stirling was "about to proceed" to Belize at once. [WILLIAMS, J.—No doubt he intended and the company expected that his departure would take place at once: but neither party *stipulated* for it.] He was bound to go within a reasonable time. [WILLES, J.—What is to be the test of reasonable time,—his convenience or his pleasure?] That would be a question for a jury. Then, as to the return of premiums. [COCKBURN, C. J.—You need not go into that.]

J. Wilde was not called upon to reply.

*480] *COCKBURN, C. J.—I am of opinion that the plaintiffs are entitled to judgment. In all probability, at the time the agreement was entered into whereby permission was given to Mr. Stirling to go to and reside at Belize on payment of the additional premium for the extra risk, both he and the company supposed that he was about to proceed thither at once, and consequently that his period of residence at that place would commence within a short period, viz., as soon as he should arrive there: but there is no stipulation that he shall proceed to Belize and commence his residence there immediately. By the terms of the agreement, permission is given to Mr. Stirling "to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid along with the premium payable on this policy." It is true that that language is somewhat ambiguous; and it is doubtful whether the words "for the time aforesaid" have reference to the proceeding to as well as the residing at Belize, or only to the last part of the sentence. I am inclined to think, taking this expression in conjunction with the subsequent words, "and for so long thereafter as the extra premium shall from time to time be paid," that it has reference to the residence only, and not to the time consumed by the voyage. But, admitting that there may be some doubt as to this, I think we are entitled to look at the recital to ascertain the meaning. That recital is as follows:—"The life assured under this policy being about to proceed to and reside at Belize, in the state of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year," &c. Now, that in terms excludes the time to be occupied in the voyage out. I think the terms of the permission must be construed by that recital: and the effect

*481] of the whole is, that *the person insured was to have twelve months' residence at Belize, independently of the time occupied by the voyage. It is said that that period is to date from the 23d of June, 1853: but there is nothing to be found in the contract to define the period from which the twelve months' residence is to date. Mr. *Bovill* has pointed out reasons of considerable cogency why the company should find it to their interest to give such permission for foreign residence commencing at or within a reasonable time after the application. Nothing could be more easy than to express that in plain terms in the instrument itself: the permission might be granted for a residence

from a given day to another given day. They have not, however, done so here: the permission is given simply for a twelve months' residence at Belize, without specifying any period from which that residence is to date. This instrument being the language of the company, must, if there be any ambiguity in it, be taken most strongly against them; and there is nothing to show that the agreement is necessarily to date from the 23d of June, 1853. Upon the whole, I think that the twenty guineas having been paid for the permission to reside for twelve months, the residence might take place at any time.

WILLIAMS, J.—I am of the same opinion. As to the first line of argument urged by Mr. *Bovill*, on the part of the defendants, viz., that the intention of the parties was that the year of residence should commence from the 23d of June, 1853, I do not feel any difficulty. It is impossible to reconcile that construction of the memorandum with the words used in it. I think, that, if the assured had proceeded to Belize within a reasonable time after the 23d of June, 1853, and had died before the expiration of the year, there could be no doubt that the money would have been payable, *provided the death took place within the year of residence. Therefore, I think it is impossible to contend that he was not to have liberty to go and live there a year without the policy being avoided. But I have entertained some doubt whether the intention was not that he should proceed thither within a reasonable time. The memorandum, however, contains no provision to that effect; and therefore I cannot adopt any other view than that suggested by my Lord. Suppose all that passed between the parties was this, that Mr. Stirling had said to the company, "I want to go and reside for a year at Belize; what must I pay?" And the answer was, "You must pay twenty guineas; and, if you wish to reside there for a longer period, you must pay twenty guineas for every additional year." If that were all that passed, there would be no agreement for any particular year. [*482

WILLES, J.—I am of the same opinion. I am by no means surprised at the point having been raised by the company; nor do I think it was an unreasonable thing for them to take the opinion of the court upon it. Both parties were evidently under an impression that Mr. Stirling intended to proceed to Belize within a reasonable time after the permission was granted. The company expected that, and that the policy would practically be on the life of a person going to reside there within a short time. That I quite see. If the company had taken care to embody that intention in an express stipulation, it would have been a condition, and would have placed the matter beyond all doubt. They have not, however, done so. They merely recite that the life assured is "about to proceed to and reside at Belize, in the state of Honduras," which can only mean that he bonâ fide intends to go. They then go on to say, that, "an extra premium of twenty guineas *having been paid for the extra risk of such residence for one year, permission is thereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid." That necessarily implies that the party was to be at liberty to take the voyage. The only use of the expression "about to proceed to," &c., is, to control the permission afterwards given. The license stands, therefore, as a clear license to reside at Belize for a year, in consideration of the payment [*483

of the twenty guineas. The stipulation is not expressed in such a form as to induce the court to hold it to amount to a condition.

BYLES, J., having advised on the case when at the bar, took no part in the discussion. Judgment for the plaintiffs.

KITCHIN *v.* WILSON and Another. *May* 29.

To entitle a plaintiff to an order to dispense with personal service of a writ of summons upon one of two defendants, members of a firm sued as acceptors of a bill of exchange, it is not enough to show that he has gone abroad, and has no private residence here: the affidavit must show upon the face of it reasonable grounds for inducing the court to conclude that he is evading service of the writ.

THE 17th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) enacts that "the service of the writ of summons, *wherever it may be practicable*, shall, as heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge; and, in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come
*484] to *the knowledge of the defendant, or *that he wilfully evades service of the same*, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit." And the 7th section of the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), enacts that "the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this act."

This action was brought by the endorsee against the defendants as acceptors of a bill of exchange for 498*l.* 15*s.*, dated the 17th of October, 1857, and payable three months after date. The defendants are merchants carrying on business together in partnership at Liverpool. A writ under the Bills of Exchange Act, 1855, had been served personally upon M'Iver, one of the defendants, but it had been found impossible to serve the other defendant. Upon application to M'Iver, he stated that the defendant Wilson was in America, that he did not know his precise address there, that he had recently addressed a letter to him at the Post-Office, New York, and that he had no private residence here. Upon an affidavit stating these facts,

Malcolm moved for an order under the 17th section of the Common Law Procedure Act, 1852, that the plaintiff be at liberty to proceed as if personal service had been effected upon Wilson. [CROWDER, J.—What special circumstances are disclosed in your affidavit, to bring the case within the act?] The debt is a partership debt; and one partner has been duly served.

*485] *PER CURIAM.—There is nothing to show that the absent partner is keeping out of the way to evade service. The case is clearly not within the statute. Rule refused.

GILKES *v.* LEONINO. *May* 28.

The defendant, on the 19th of August, 1853, contracted to purchase of the plaintiff a parcel of Chassum waste-silk, "to arrive in all probability in January and February next, but further particulars will be furnished respecting the name of ship or ships in the next mail or on receipt of the next after that." The second mail after the 19th of August arrived in London on the 19th of September. No name of any ship was then communicated to the defendant; and, on the 18th of January, 1854, the defendant wrote,—"We give you *one week* from this day's date to give to us the name of the ship on which the 20,000 lbs. of Chassum is on board, and, in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last. To this the plaintiff replied on the same day,—"I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19. 8. 53, by imforming you that it is already arrived, and that you will receive invoice in due course." On the 19th, the defendant wrote,—"Your letter of yesterday is not an answer to ours of the same date, which required the name of the ship on which the Chassum had been shipped; and this is the information which we now again call for: but, as you say the Chassum has arrived, there is no occasion for the delay of a week in giving the information, which we now ask for *in the course of to-morrow*; in default of which we shall act as indicated in our letter of yesterday." The names of two ships were given on the 24th and 25th of January:—

Held, that the defendant's offer to renew the contract not having been in terms accepted by the plaintiff, the defendant was at liberty to retract it; and that his letter of the 19th of January was a sufficient retractation.

THIS was an action against the defendant for not accepting certain silk pursuant to contract.

The declaration stated that the plaintiff, at the request of the defendant, agreed to sell to the defendant, and the defendant agreed to buy from the plaintiff, a large quantity, to wit, 20,000 lbs. of Chassum waste-silk, at 9*d.* per pound, the said silk to arrive in London probably in January or February, 1854, but further particulars to be furnished respecting the name of the ship or ships in the mail next after the making of the said agreement, or on receipt of the mail next after that; and it was also agreed between the plaintiff and the defendant that the silk should be equal to a sample in possession of the broker: Averment, that afterwards, and before the month of *January, 1854, had elapsed, the defendant waived the said agreement so far as it related to [*486 particulars respecting the name of the said ship or ships being furnished in the mail next after the making of the said agreement, or on receipt of the mail next after that, and the defendant gave to the plaintiff the further time of one week from the 18th of January, 1854, for the particulars being furnished by the plaintiff to the defendant respecting the name of the said ship or ships; and, in consideration of the premises, and that the plaintiff would furnish particulars respecting the name of the said ship or ships within the said period of one week, and would observe the said agreement in all things on his part to be observed, except as to the part thereof so waived as aforesaid, the defendant promised the plaintiff to accept the said silk, and pay for the same at the rate and in manner aforesaid: That the said quantity, to wit, 20,000 lbs., of Chassum waste-silk equal to the said sample having arrived in London aforesaid in two ships, that is to say, the "Chalmers" and the "Benares," he, the plaintiff, within the week next ensuing the said 18th of January, 1854, furnished to the defendant the names of the said ships as the ships in which the said silk had arrived, and he, the plaintiff, then tendered and offered, and then and ever since had been ready

and willing to deliver, the said silk to the defendant, and he, the plaintiff, had observed all things necessary to entitle him to have the said silk accepted and received and paid for by the defendant according to the said agreement: Yet that the defendant, disregarding his said agreement, had not accepted or received the said silk, or any part thereof, although a reasonable time for his accepting and receiving the said silk had elapsed before the commencement of this suit; and the defendant
*487] had wholly refused to accept and receive the same; whereby the *plaintiff had lost and been deprived of the benefit of the said sale of the said silk.

The defendant pleaded,—first, that the plaintiff did not agree to sell, nor the defendant to buy, the said silk as in the declaration first alleged, —secondly, that the defendant did not promise as in the declaration alleged,—thirdly, that he, the defendant, did not waive the said agreement so far as it related to the said particulars respecting the name of the said ship or ships, or give the plaintiff the further time alleged for the particulars being furnished by the plaintiff respecting the name of the said ship or ships, as alleged,—fourthly, that the alleged agreement in the declaration mentioned was made by corresponding bought and sold notes, and upon the terms thereof, and not otherwise; and that the terms of the bought note, wherein the defendant was described as Leonino Brothers & Co. were as follows [setting it out]: That further particulars were not furnished to the defendant respecting the name of the said ship or ships in the mail next after the making of the said alleged agreement, or on receipt of the mail next after that, although both those periods, and a reasonable time for furnishing the said further particulars had elapsed long before the alleged waiver and giving of time, whereby the said contract was broken by the plaintiff, and the defendant discharged from its fulfilment: And that, after the alleged waiver, giving of time, and promise, and before the plaintiff had accepted, assented to, or acted upon the same, or either of them, and before the plaintiff had agreed to furnish the alleged particulars within the said period of one week, or to observe the said agreement except as to the part alleged to have been waived, the defendant retracted his alleged waiver and promise, and gave notice thereof to the plaintiff,—fifthly, that the said
*488] quantity equal to the said sample *did not arrive in the said ships as alleged,—sixthly, that the plaintiff did not within the said week furnish to the defendant the names of the said ships as alleged.

Upon these several pleas the plaintiff joined issue.

The cause came on for trial before Jervis, C. J., at the sittings in London after Trinity Term, 1855, when a verdict was by consent found for the plaintiff, subject to the opinion of the court upon the following case,—the damages to be referred, if the decision of the court should be in favour of the plaintiff:—

The plaintiff, during the period to which the case refers, was a merchant carrying on business in London. During the same period, the defendant also was a merchant carrying on business in London, under the firm of Leonino Brothers.

Mr. H. W. Eaton was a silk-broker, carrying on business in the city of London; and in the sale and purchase of the silk in question was the broker and agent of the plaintiff and defendant respectively.

On the 19th of August, 1853, a contract was made between the plaintiff and the defendant, through the said Mr. Eaton, as their respective broker and agent, for the sale by the plaintiff to the defendant of a parcel of Chassum waste-silk, the terms of which contract are contained in bought and sold notes made and signed by the said Mr. Eaton as the agent and broker of the said parties respectively. The following is a copy of the sold note which was sent by the said Mr. Eaton to the plaintiff:—

"London, 19th August, 1853. Sold for account of Mr. Gilbert Gilkes a parcel of Chassum waste-silk, 20,000 lbs., at 9*d.* per lb., East India Company's terms; to arrive in all probability in January and February next; but further particulars will be furnished respecting the name of ship or ships in the next mail or on receipt of the next after that. It is also understood *that the silk is to be equal to sample in possession of the broker. Should the ship sink, this is to be considered no sale. [*489

"HENRY W. EATON, 33, Old Broad Street."

[A copy of the bought note, which was in the same terms, was also set out.]

Chassum waste-silk was and is imported chiefly from India.

At this time, in regular course, two mails from India arrived overland in this country in each month. It was usual to notify by mails thus arriving the sailing of vessels for England; and information of the fact of sailing reached England in this way a considerable time before the vessels themselves could reach their destination. The departure of vessels for this country which in due course would arrive in January and February might thus have been known here in the preceding months of September and October.

The mail referred to in the bought and sold notes as the "next mail" was received in London from Calcutta on the 28th of August, 1853; and the mail therein referred to as the "mail next after that," was received in London on the 19th of September, in the same year.

The plaintiff was unable to furnish, and did not furnish, to the defendant, on receipt of the said mails, or either of them, particulars of any ship or ships as the ship or ships in which the said silk contracted to be sold by the plaintiff to the defendant, or any part thereof, was shipped.

Shortly after the 19th of September, 1853, viz., on the 22d of that month, the defendant wrote and sent to Mr. Eaton the following letter:—

"By your contract of the 19th August, it was agreed that, on the arrival of the July mail from India, at the latest, you were to furnish us with the name of the vessel on which were shipped the 20,000 lbs. *Chassum bought through you. We beg, therefore, you will do so." [*490

Mr. Eaton, having communicated to the plaintiff the contents of this letter, on the following day wrote and sent to the defendant, by the plaintiff's direction, the letter following:—

"London, 23d September, 1853.

"I am in due receipt of your letter of yesterday, and have been in communication with my principal respecting the parcel of Chassum. I regret that by this last mail from India he has had no advice of the

vessels by which it was to be sent; but any particulars respecting it that may arrive by the next mail shall be immediately transmitted to you."

On the 24th the defendant wrote and sent the following letter to Mr. Eaton:—

"We are in receipt of your letter of yesterday, informing us that you are still unable to furnish us with the name of the vessel by which the parcel of Chassum we bought through you was to be sent. This being contrary to the clause in your contract of the 19th August last, wherein it was stipulated that we should have the name of the vessel on the arrival of last mail, at the latest, we beg to protest against this deviation from the contract: and we have to hold you and your principal responsible for any damage which may arise to us from this irregularity."

Mr. Eaton thereupon sent a copy of the last-mentioned letter to the plaintiff, enclosed in the letter following:—

"London, 24th September, 1853.

"Upon informing my buyer that I was unable to give him particulars of the ships by which the parcel of Chassum sold for you, to arrive on the 19th of August last, was to be sent, he has sent me a letter, the
*491] copy of which I now annex, protesting against *the irregularity in not conforming to the clause in the contract which states that the names of the ships were to be furnished on receipt of the last mail from India."

After this, the following correspondence passed relating to the Chassum waste-silk purchased by the defendant from the plaintiff as aforesaid. The letters were respectively written and received by the persons by and to whom they respectively purport to be written and addressed, and they were so written and received in the order in which they are set out, and on the days on which they respectively bear date. Mr. Rodwell, to whom two of the letters were addressed, and by whom one of them was written, was the managing-clerk of Mr. Eaton.

"London, 12 mo. 13, 1853.

"Henry Rodwell (at H. W. Eaton's, 33, Old Broad Street.)

"It is important for me to know whether your buyer wishes to have the 20,000 lbs. Chassum delivered to him at 9*d.*, in accordance with the terms of contract. Please let me know definitely in the course of the day. "GILBERT GILKES."

"London, 12 mo. 16th, 1853.

"Henry Rodwell (at H. W. Eaton's, 33, Old Broad St.)

"Not having a reply to my inquiry of the 13th relative to the 20,000 lbs. Chassum at 9*d.* per lb., I write to request thou wilt inform thy buyer, that, if he does not decide to accept my offer to cancel the contract by the end of the present week, I shall consider him bound to accept delivery at the price above stated, and act accordingly. The fairness of this course I am sure thou wilt admit.

"GILBERT GILKES."

"Mr. Gilbert Gilkes. "17th December, 1853.

*492] "Sir,—As requested by you, I have seen Messrs. *Leonino & Co. upon the subject of your contract dated 19th August,

1853, agreeing to deliver to them certain Bengal Chassum during the months of January and February, 1854, also to give them the names of the ships in which it was to arrive, on receipt of the next mail, or the next but one after date of the contract. I am sorry to say that the only reply I can obtain from them is, that it is their intention to claim of you compensation for the loss they have sustained by your not performing the latter condition of this contract. I will of course do all in my power to induce them to change their determination.

"for H. W. EATON, HENRY RODWELL."

"London, 10th January, 1854.

"H. W. Eaton, Esq., Old Broad Street.

"Dear Sir,—We beg to hand you on the other side our claim for damage sustained for the non-fulfilment of your contract of the 19th August, 1853, for 20,000 lbs. of Chassum. Damage, 3d. per lb., making 250*l.*, for which please send me a check, or to name your principal in order that we may claim from him the amount.

"LEONINO BROTHERS."

"Mr. Gilbert Gilkes. "13th January, 1854.

"Sir,—I beg to enclose you a copy of the contents of a note just received from Messrs. Leonino Brothers, to which I beg your immediate attention. "HENRY W. EATON."

The above letter of the 10th of January is the letter of which copy was then enclosed.

"Henry W. Eaton. "1 mo: 14, 1854.

"I am duly in receipt of thy note accompanying a copy of one from Leonino Brothers relative to the contract for 20,000 lbs. Chassum at 9*d.* per lb., to be delivered in this and the following month. I am very much surprised in the manner in which they write, as the time for delivery is not yet arrived; and more *especially so when I take into account the proposal made to me to allow them to cancel the contract. Under the circumstances, I can do no other than deliver the Chassum to contract, which I intend to do in the course of this and the following month. I shall feel obliged by thy informing them of this. [*493

"GILBERT GILKES."

"Messrs. Leonino Brothers. "17th January, 1854.

"I beg to hand you a copy of a letter just received from my principal, Mr. Gilbert Gilkes, in reply to your letter of the 10th instant, a copy of which was forwarded to him. "H. W. EATON."

The above letter of 14th of January is the letter of which a copy was then enclosed.

"Mr. Gilbert Gilkes. "London, 18th January, 1854.

"Sir,—Mr. H. W. Eaton having sent us a copy of your letter to him 14th instant, in reply we beg to state that *we give you one week* from this day's date to give to us the name of the ship on which the 20,000 lbs. of Chassum is on board; and, in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last on your part, and shall then take such measures as we may deem necessary for the protection of our interests.

"LEONINO BROTHERS."

On the same 18th of January, 1854, and immediately after the receipt by him of the letter from the defendant last set forth, the plaintiff applied to Mr. Spensley, a silk-broker then carrying on business in London, to procure for him 20,000 lbs. of Chassum waste-silk equal to the above-mentioned sample; and, in order to enable him to do so, the plaintiff produced and gave to Mr. Spensley a sample of the said silk.

*494] *On the same day, the said Mr. Spensley secured for the plaintiff the refusal of 41 bales of Chassum waste-silk which had been brought from Calcutta to London in the ship "Chalmers;" and Mr. Spensley informed the plaintiff thereof, and at the same time informed him that he expected to secure for him the refusal of another parcel of Chassum waste-silk sufficient to make up the 20,000 lbs., which last-mentioned parcel of silk had been brought from Calcutta to London in the ship "Benares." The plaintiff's object in thus applying to Mr. Spensley, was, to obtain the means of delivering 20,000 lbs. of Chassum waste-silk to the defendant at the contract price, if the defendant would receive the same as for and in fulfilment of such contract.

On receiving this information, the plaintiff, on the same day, wrote and sent to the defendant the following letter:—

"Leonino, Brothers. "18. 1 mo., 1854.

"Gentlemen,—Your favour of this date is duly received, and I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19. 8. 53, by informing you that it is already arrived, and that you will receive invoice in due course. "G. GILKES."

On the 18th of January, 1854, Mr. Spensley secured for the plaintiff the refusal of 55 bales of Chassum waste-silk, being the aforesaid parcel of silk which had been brought to London in the "Benares;" and, on the following morning early, he informed the plaintiff thereof.

Except as above may appear, no notice or information was given to the defendant of what occurred between the plaintiff and Mr. Spensley, or of any steps taken by Mr. Spensley in consequence.

*495] After this, the following correspondence passed *relative to the said silk, and the aforesaid contract for the same, between the plaintiff and the defendant.

The letters were respectively written and received by the persons by and to whom they respectively purport to be written and addressed, and were so written and received on the days on which they respectively bear date, and in the order in which they are set out. Mr. Cotterill, the writer of one of the letters, was the attorney of the defendant, and Mr. Beavan, the writer of another of them, was the plaintiff's attorney.

"Mr. Gilbert Gilkes. "London, 19th January, 1854.

"Sir,—Your letter of yesterday is not an answer to ours of the same date, which required the name of the ship on which the Chassum had been shipped; and this is the information which we now again call for: but, as you say the Chassum has arrived, there is no occasion for the delay of a week in giving the information, which we now ask for in the course of to-morrow; in default of which, we shall act as indicated in our letter of yesterday. "LEONINO BROTHERS."

"Leonino Brothers. "1 mo. 23, 1854.

"Gentlemen,—Referring to my note to you of the 18th instant, I beg to inquire when it will be convenient for you or your broker to compare the 20,000 lbs. Chassum to contract with the sample.

"GILBERT GILKES."

"Mr. Gilbert Gilkes. "London, 23d January, 1854.

"Dear Sir,—We have your letter of this date, and beg, as a preliminary to answering it, to know by what ship the Chassum you offer us has arrived. "LEONINO BROTHERS."

"Leonino Brothers. "1 mo. 24, 1854.

"Gentlemen,—In compliance with yours of *yesterday, received this morning, I now forward you samples of 41 bales of [*496 Chassum ex 'Chalmers,' Nos. 1/41, to your contract. The remaining quantity I purpose sending to-morrow, with all particulars. You will find them generally better than sample contracted for.

"GILBERT GILKES."

"Mr. Gilbert Gilkes. "January 24th, 1854.

"Sir,—Messrs. Leonino Brothers have shown me their contract and correspondence with you. They consider you were bound to give them the name of the ship soon after she sailed, that is, as soon as information of her sailing had been received here: and they cannot accept in satisfaction of your contract a cargo which has been here for two or three months, and has been repeatedly offered for sale to them and others. Therefore, as you have not properly met their applications, they desire me, on their behalf, to give you notice that they consider the contract violated by you, and at an end; and that they will not take the silk per 'Chalmers,' or any other from you.

"W. H. COTTERILL."

"Messrs. Leonino Brothers. "1 mo. 25, 1854.

"Gentlemen,—In accordance with my letter of yesterday, I beg to inform you that the name of the vessel by which the rest of the Chassum deliverable to your contract has arrived, is the 'Benares.' In consequence of your solicitor's letter, to hand this morning, I do not send the samples, as he therein informs me you decline to receive any silk whatever from me, or to this effect. "GILBERT GILKES."

"Messrs. Leonino Brothers. "London, 26 January, 1854.

"Gentlemen,—Mr. Gilkes has consulted me on the subject of your refusal to accept 20,000 lbs. of Chassum silk pursuant to contract. I have, therefore, to request *the name of your solicitor, to whom [*497 I may send process, instead of troubling you personally.

"WILLIAM BEVAN."

The "Chalmers" sailed from Calcutta, on the 27th of April, 1853, with the said 41 bales of silk on board, and arrived in London on the 7th of October, 1853: and the "Benares," with the said 55 bales of silk on board, sailed from Calcutta on the 21st of August, 1853, and arrived in London on the 6th of December, in the same year. The said 41 bales and 55 bales together made up 20,000 lbs. of Chassum waste-silk; and such silk was equal to the sample mentioned in the bought and sold notes. The plaintiff would have delivered the said silk to the defendant

within a reasonable time after the 25th of January, 1854: but the defendant refused to receive the same, contending that he was not liable so to do under the above-mentioned circumstances.

The defendant is to be at liberty to contend that the statements in the case as to Mr. Spensley, and what was done by him, are irrelevant, and would have been inadmissible in evidence for the plaintiff: and, if the court shall be of that opinion, such statements are to be treated as struck out of the case.

The court are to draw any inferences of fact from the premises, which the jury ought reasonably to have drawn.

The question for the opinion of the court, is, whether the plaintiff is entitled, under the above-stated circumstances, to recover in this action; and the verdict is to be entered on the several issues as the court shall direct.

Montague Smith, Q. C. (with whom was *Unthank*), for the plaintiff.(*a*) *498] —The facts stated in the special *case clearly sustain the declaration. Assuming that the naming of the ship or ships was a condition precedent as the contract originally stood,(*b*) the plaintiff performed his contract as amended by the new term introduced by the subsequent correspondence. The mail by which the name of the ship should have been communicated arrived in London on the 19th of September, 1853. The plaintiff being unable to comply strictly with the terms of the contract in that respect, a correspondence ensued between him and the defendant; and, on the 18th of January, 1854, the latter wrote,—"We give you one week from this day's date to give us the name of the ship on which the 20,000 lbs. of Chassum is on board; and, in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last." Upon the receipt of this letter, the plaintiff procured the necessary quantity of silk of the quality and description contracted for, and on the same day gave the defendant notice of its arrival, by a letter in which he said,—"I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19. 8. 53, by informing you that it is already arrived, and that you will receive invoice in due course." That was a clear acceptance of the terms of the waiver. [CROWDER, J.—The plaintiff does not even then communicate the name of the ship.] By the terms of the defendant's letter, he had a week to do so. [COCKBURN, C. J.—You say, that, provided the silk was of the description and quality contracted for, it need not have been afloat at the time of the contract?] It is not necessary to go so far: the vessels *499] in *which the silk tendered was brought were afloat at the time the contract was made. On the 19th, the defendant wrote,—"Your letter of yesterday is not an answer to ours of the same date, which required the name of the ship on which the Chassum had been shipped; and this is the information which we now again call for: but, as you say the Chassum has arrived, there is no occasion for the delay of a week in giving the information,—which we now ask for in the course of to-mor-

(*a*) The points marked for argument on the part of the plaintiff, were,—"That the naming of the ship was not a condition precedent, or, if it was, that it was waived; and that such waiver could not be retracted by the defendant after it had been acted on by the plaintiff by his procuring the necessary silk through Mr. Spensley, as mentioned in the special case."

(*b*) See Greaves v. Legg, 9 Exch. 709,† 11 Exch. 642.†

row; in default of which, we shall act as indicated in our letter of yesterday." That was no retractation of the offer of the preceding day. [COCKBURN, C. J.—The letters of the 23d seem rather to intimate that both parties considered the matter still open. On the 18th, there is an offer to waive a breach already incurred: on the same day, there is a sort of qualified acceptance of the waiver; and, on the 24th and 25th, the defendant is informed of something which if he had known it before would have induced him to withhold his waiver. The question is, whether the defendant could retract his waiver after it had been accepted by the plaintiff.] And acted upon by his procuring the requisite quantity of silk. This is, in truth, not so much a waiver, as a new contract upon the terms of the old one other than the time for giving the name of the ship. If the defendant *could* retract his offer of the 18th of January, the facts hardly amount to a retractation. He had given seven days for communicating the ships' names; and the name of the one was given on the 24th, and the other on the 25th, and the stipulated quantity of silk out of those ships (which was equal to the sample) was offered within the seven days. [WILLIAMS, J.—When do you say there was a contract to give the names within seven days?] When the plaintiff assented to the proposal, by his letter of the same date. [COCKBURN, C. J.—*That letter does not adopt the new contract in the terms of the defendant's offer. The plaintiff's letter in substance [*500 says, "You do not want the name of the ship: you shall have the goods."] The invoice would necessarily mention the ships' names. Besides, it was enough if the plaintiff assented to give the names of the ships within the seven days.

Atherton, Q. C. (with whom was *Cohen*), contrà.—By the terms of the contract, the plaintiff undertakes not later than the arrival of the second mail from the date (which proved to be the 19th of September, 1853), to notify the names of the ship or ships by which the silk was to arrive. The contract is dated the 19th of August, 1853. It contemplated not only that the silk which was its subject was afloat at the time, but that it was on board a ship or ships the sailing of which had not yet been ascertained in this country; two mails being allowed for that purpose. [COCKBURN, C. J.—Would not silk by the "Chalmers" and the "Benares" have satisfied the contract, if the names of those vessels had been communicated to the defendant on the 14th of January?] Those ships were not in the contemplation of the parties at the time of the contract. "The Chalmers" had sailed from Calcutta nearly four months before. On the 19th of September, 1853, therefore, there was a clear breach of the contract: and there is no pretence for saying that there was any waiver of that breach, or any new contract, down to the 18th of January, 1854. Now, what was the state of things on that day? The "Chalmers" sailed from Calcutta on the 27th of April, and arrived in London on the 7th of October, 1853: and the "Benares" sailed from Calcutta on the 21st of August, and arrived here on the 6th of December, 1853. The fact of those vessels having sailed would be known in this country in June and *October respectively. What [*501 does the defendant offer by his letter of the 18th of January, 1854? He says,—"We give you one week from this day's date to give us the name of the ship on which the 20,000 lbs. of Chassum is on board." Whatever be the construction of that offer, it was not accepted

so as to make it obligatory as a new contract on the part of the plaintiff. No ship is named; but the defendant is told that the silk contracted for has already arrived, and that he will receive the invoice in due course. There is no evidence of the plaintiff's having accepted the defendant's offer in the sense in which he must have accepted it to entitle him to succeed upon these pleadings, viz. as having taken upon himself a binding obligation, so as to give the defendant a cause of action for a breach of that new contract. The defendant, therefore, had a perfect right to retract his offer.

M. Smith, in reply.—The defendant's letter of the 18th of January gave the plaintiff seven days to name the ships. [COCKBURN, C. J.—Yes, provided there was an adoption of the terms of the offer, so as to give a cause of action for the breach of it.] The plaintiff's answer amounts to an assent,—"The silk has arrived, and you will receive invoice in due course." The defendant might reasonably infer from that that the plaintiff meant to comply with the offer which had been made to him. There is no evidence of any retractation of the offer before the name of one ship was given; and it was not necessary that the names of *both* should be given: it was enough if that came before the expiration of the seven days. By his letter of the 23d, the defendant treats the offer as still open.

COCKBURN, C. J.—I am of opinion that the defendant is entitled to the judgment of the court. The facts lie *in a narrow compass. *502] The action is brought for the breach of a contract for the purchase of a large quantity of silk upon a condition which is admitted to be a condition precedent, viz. that the name or names of the ship or ships by which the silk was to come should be furnished by the next mail or on receipt of the next after that. The second mail after the date of the contract arrived in this country on the 19th of September, 1853; but no ship's name was communicated. On that day, therefore, the plaintiff broke his contract, and the defendant was entitled to consider it at an end. Instead, however, of availing himself of the breach, the defendant, on the 18th of January, 1854, writes to the plaintiff offering him a week's further time. Upon the letter conveying that offer, and the plaintiff's answer, the question mainly turns. The defendant writes,—"We give you one week from this day's date to give us the name of the ship on which the 20,000 lbs. of Chassum is on board; and, in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last on your part, and shall then take such measures as we may deem necessary for the protection of our interests." The plaintiff's answer to that is,—"I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19. 8. 53, by informing you that it is already arrived, and that you will receive invoice in due course." The declaration sets out the contract, and avers that the defendant waived the same as far as it related to the particulars respecting the name of the ship or ships being furnished by the arrival of the second mail, and that the defendant gave the plaintiff a week's further time from the 18th of January, 1854, for the particulars being furnished to him respecting the name of the ship or ships, that within the week next ensuing the said 18th

*of January, 1854, the plaintiff furnished to the defendant the names of the said ships, and tendered the silk, but that the [*503 defendant refused to accept the same. The fourth plea, which is the material one, states, that, after the alleged waiver and giving of time, and before the plaintiff had accepted, assented to, or acted upon the same, and before the plaintiff had agreed to furnish the alleged particulars within the said period of one week, the defendant retracted his alleged waiver and promise, and gave notice thereof to the plaintiff. The question is, whether the plaintiff accepted the defendant's offer in the terms in which it was made, before the defendant retracted it. The defendant's offer is couched in plain terms,—"I give you one week to name the ship." The plaintiff's answer amounts in effect to this,—"You are now proposing that I should within a week furnish you with the name of the ship in which the silk is: but that is altogether unnecessary; the silk is arrived, and you shall receive the invoice in due course." He does not even say, "You shall have the name within the time you mention." It appears to me that Mr. *Atherton's* argument is well founded. The fair way to judge of the matter, is, to consider what would be the situation of the parties if the defendant had sued the plaintiff for not furnishing the name of the ship or ships within the week. The answer of the plaintiff would have been,—"I did not promise to furnish the name within that time." It may very fairly be said that this was a captious proceeding on the part of the defendant: but, the plaintiff being altogether at his mercy, he had an undoubted right to prescribe the terms upon which alone he would renew the contract. He did prescribe certain terms; and, unless the plaintiff accepted his offer in the terms in which it was made, the defendant clearly had a right to revoke his offer. I think it is clear that *the plaintiff's letter [*504 was not an acceptance, so as to create a binding contract, and therefore that the defendant was entitled to revoke the offer.

WILLIAMS, J.—I am of the same opinion. I entertain considerable doubt whether the plaintiff ever did name the ships within the meaning of the contract. But it is unnecessary to consider that; for, I think it clear that the plaintiff has failed to prove his right of action as developed in the declaration. The declaration does not rely on the waiver, except as raising a new contract: and the question is, whether that contract is made out. Assuming it to be a contract which would be binding on both sides, there is no proof of it. The plaintiff's letter of the 18th of January is no acceptance of the defendant's offer. He evidently shrinks from coming to any terms about naming the ship: he evades the question. If it could have been made out upon the facts that there was a contract that was binding between the parties notwithstanding the plaintiff had not accepted the offer in its terms, possibly the declaration might have been amended, to meet that view of the case. But it seems to me that that is impossible. The defendant says,—"If you will furnish me with the name of the ship within a week, I will consent to consider the contract as a still existing contract." The plaintiff might have fixed that proposal by naming the vessel at once. But it seems to me that a one-sided contract like that may be retracted before acceptance. And this offer was retracted.

CROWDER, J.—I am of the same opinion. I also must say that I entertain considerable doubt whether the names of the ships were given

in accordance with the intention of the parties. But it is unnecessary
*505] to decide that, because the plaintiff's letter of the 18th *of January, 1854, clearly was no acceptance of the proposal contained in the defendant's letter of the same date. I think the fourth plea was made out. Looking at the two letters, it seems to me to be clear that the defendant's letter was a conditional offer to renew the contract, provided the name of the ship was given within a week. The language of that letter evidently refers to a ship which had not yet arrived, and must have been so understood by the plaintiff. That is clear, from the expression used, "on which the 20,000 lbs. of Chassum is *on board*." The plaintiff in answer writes,—"I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19. 8. 53, by informing you that it has already arrived, and that you will receive invoice in due course." Can that be said to be an acceptance of the defendant's offer? The plaintiff's letter shows that he understands the defendant's proposal as having reference to goods "expected to arrive." It is giving the go-by to the defendant's offer. The defendant had a right to prescribe terms, arbitrary though they seem to have been. There was nothing like an acceptance on the 18th: and, on the following day, there comes that which appears to me to be a clear retractation of the defendant's previous offer,—changing the offer of a week to a day. For these reasons, it seems to me that the fourth plea is proved, and that it affords a sufficient answer to the declaration.

Judgment for the defendant.

Where a negotiation is conducted by letters, a proposition made on one side, professedly accepted by the other, but with a material qualification annexed, will not constitute a contract until the qualification be, in its turn, accepted by the party making the original proposition: Ocean Ins. Co. *v.* Carrington, 3 Connecticut 357. See Hamilton *v.* Lycoming Ins. Co., 5 Pennsylvania State 339.

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*506] *ROBERTS v. THE GREAT WESTERN RAILWAY COMPANY.

The first count of the decaration stated that the defendants were the owners and occupiers of a railway, and of a station thereon for the loading, unloading, &c., of cattle carried thereby, and of a yard adjoining the station and railway, into and through which yard cattle brought by the railway to the station were used and accustomed and were obliged to pass in going from the station to a certain common highway near thereto; and that the defendants, by reason of the premises ought to have made and maintained good and sufficient fences between the said yard and the railway, so as to prevent cattle lawfully being in the yard from straying thereout into and upon the railway; but that they omitted to make and maintain such fences, whereby a bull of the plaintiff, lawfully being in the yard, on his way to the highway, without default or negligence on his part, strayed from the yard on to the railway, and was killed by a passing train:—Held, that there was no liability upon the company, either by the common law or by the statute 8 & 9 Vict. c. 20, s. 68, to fence their yard from the railway, and consequently that the count disclosed no cause of action.

The second count alleged that a certain bull of the plaintiff was lawfully in a close adjoining a railway of which the defendants were owners and occupiers, and along which railway they had not made any fences for preventing cattle being in the close from straying thereout upon the railway, and that, whilst the bull was lawfully in the close, the defendants and their ser-

vants, negligently and wrongfully, chased, startled, and frightened the bull, and so caused it to run upon the railway, where it was killed. At the trial, it appeared that the bull, with other cattle which had been brought by the railway, being in the station yard, a place unlighted and not fenced from the railway, a porter came out of the office with a lantern such as were ordinarily used by porters in his hand, and that the light startled some of the beasts, and caused the plaintiff's bull to run upon the line, where it was knocked down and killed by a passing train:—Held, no evidence for the jury that the company's servants had been guilty of negligence.

THIS was an action against the Great Western Railway Company, for negligence.

The first count of the declaration stated, that the defendants were the owners and occupiers of a certain railway, and of a station thereon for the landing, unloading, and delivery of cattle carried on and by the said railway, and of a certain yard adjoining the said station and the said railway, into and through which yard cattle carried and brought on and by the said railway to the said station were used and accustomed, and were of necessity obliged, to pass in going from the said station to a certain common highway near thereto; and that the defendants, by reason of the premises, ought to have made and maintained good and sufficient fences between the said yard and the said railway, so as to prevent cattle lawfully being in the said yard from straying thereout into and upon the said railway; yet that the defendants did not make or maintain good, sufficient, or any fences between the said yard and the said railway; whereby a bull *of the plaintiff, lawfully being in [*507
the said yard on his way from the said station to the said common highway, without any default or negligence on the part of the plaintiff, strayed from the said yard into and upon the said railway, and was upon the said railway by a locomotive engine and train of carriages of the defendants, and driven by their servants, run down, killed, and lost to the plaintiff.

The second count stated that a certain bull of the plaintiff was lawfully in a close adjoining a railway of which the defendants were owners and occupiers, and along which railway they had not made or maintained any fences for preventing cattle being in the said close from straying thereout into or upon the said railway; and while the said bull of the plaintiff was lawfully in the said close, the defendants and their servants carelessly, negligently, wrongfully, and improperly chased, startled, and frightened, the said bull, so that he, being so chased, startled, and frightened, ran, rushed, and strayed out of the said close into and upon the said railway, and upon the same was by a locomotive engine and train of carriages of the defendants, and driven by their servants, run down, killed, and lost to the plaintiff.

The third count stated, that, the defendants being carriers of cattle for hire, the plaintiff delivered to them as such carriers, and they as such carriers received from him, certain cattle of the plaintiff, to wit, a bull, to be carried by them for the plaintiff from Oswestry to Wolverhampton, and there, to be delivered by them to the plaintiff, for reward to them in that behalf; yet that the defendants, whilst they so had the said bull for the purpose aforesaid, did not take due and proper care of the same, but wholly neglected to do so, and so carelessly, negligently, and improperly carried the same, and took such bad care thereof, [*508
that, *by their negligence, carelessness, and improper conduct in

that behalf, the said bull became and was lost to the plaintiff. Claim, 100*l.*

The defendants pleaded,—first, not guilty,—secondly, to the last count, that the plaintiff did not deliver to the defendants, as such carriers as therein mentioned, the said cattle, on the terms therein alleged, —thirdly, to the last count, that the said cattle therein mentioned were delivered to and received by the defendants to be carried and delivered as in that count mentioned, under and subject to certain just and reasonable conditions made by the defendants, and known and assented to by the plaintiff, with respect to the receiving, forwarding, and delivering the said cattle, that is to say, that the said company was to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading, from suffocation, from being trampled on or bruised or otherwise injured in transit, from fire, or from any other cause whatsoever; and that the said loss in the said last count mentioned arose in and during the delivery of the said cattle by the defendants to the plaintiff at Wolverhampton aforesaid under the terms of the said conditions, and not otherwise.

The plaintiff joined issue on all the pleas.

The defendants also demurred to the first count, the ground of demurrer stated in the margin being, "that it does not appear that there was any obligation on the defendants to make or maintain any fence between the said yard and the railway." Joinder.

The cause was tried before Watson, B., at the last Spring Assizes at Oxford. The facts which appeared in evidence were as follows:—The plaintiff, in March, 1857, sent the bull in question with other beasts by the defendants' railway from Oswestry for Wolverhampton, in the care *509] of a drover. When the train arrived *at Wolverhampton, the drover and his assistants let the beasts out of the trucks on to the platform, and thence into a yard belonging to the company adjoining the railway, but not fenced therefrom. They received no assistance from the company's servants. Whilst the beasts were in the yard, a porter belonging to the railway came out of the office into the yard with a lantern in his hand, it being dark. The light or "bull's-eye" of the lantern startled the beasts, when three of them went on to the line, and were killed by a passing train. One of the animals so killed belonged to the plaintiff.

On the part of the plaintiff it was submitted, that the evidence showed that the accident to the bull was the result of negligence on the part of the company's servant in going incautiously into the yard with a light of a description which would naturally alarm cattle; and that the company were guilty of negligence in omitting properly to fence the yard from the railway.

For the defendants it was contended, that there was no obligation on the company to fence between the yard and the railway, that "not guilty" merely put in issue the fact whether the fence was made or not, and not the duty alleged in the first count, and that there was no evidence to go to the jury in support of the second count.

The learned judge directed a verdict to be entered for the plaintiff, for 34*l.*, the value of the bull, upon the first count, because there was no traverse of the alleged obligation to fence,—reserving leave to the defendants to move. As to the second count, he ruled that there was

no evidence to go to the jury, and he directed a verdict to be entered for the defendants, inasmuch as the servant of the company in going into the yard with a light on a dark night was doing no more than was necessary and within the ordinary scope *of his duty. And, as to the third count, he held that the defendants were entitled to the verdict, the cattle at the time of the accident being out of the custody and care of the company, and, if still in the company's care, the company were protected by the notice stated in the third plea, which was put in. And he reserved a general leave to the defendants to move to enter the verdict on these facts, if the court should think fit, upon either count. [*510

Pigott, Serjt., in Easter term last, accordingly moved to enter a verdict for the defendants on the first count, or to arrest the judgment.—The learned judge directed the verdict to be entered for the plaintiff on the first count, because there was no traverse of the duty therein alleged. But all the authorities are clear that you cannot take a traverse of a duty which is alleged to flow from certain premises. Now, all that is alleged by way of foundation for the duty to fence, is, that the defendants were the owners and occupiers of the railway and of the close or yard adjoining. [WILLES, J.—The declaration should have gone on to allege that the locus in quo, by reason of the want of fence, was more than ordinarily dangerous,—like a trap-door in a shop. Unless that is the meaning of the declaration, it is bad: but that question will arise when the demurrer comes on to be argued. Since the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 143—145, a motion in arrest of judgment is not your proper course. This is an action for an omission to perform a duty. The 16th of the Pleading Rules of Hilary, 1853, provides, that, "in actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." [BYLES, J.—Is not the obligation to fence *admitted?] The allegation of the duty to fence is mere surplusage, and could not be traversed. Thus, in Brown *v.* Mallett, 5 C. B. 599 (E. C. L. R. vol. 57), it was held, that, where a declaration, after stating certain facts, alleges that it *thereupon* became the duty of the defendant to do a certain act, such allegation is to be understood as a mere exposition of the legal liability supposed to result from the previously stated facts, as an assertion that the defendant became thereby bound by law to do the act,—and not as a distinct substantive allegation. So in Cane *v.* Chapman, 5 Ad. & E. 647 (E. C. L. R. vol. 31), 1 N. & P. 104 (E. C. L. R. vol. 36), a traverse of an inference of law was held bad on demurrer. In Seymour *v.* Maddox, 16 Q. B. 326 (E. C. L. R. vol. 71), the declaration stated that the defendant was possessed of a theatre, and of a stage therein on which dramatic entertainments were given, and of a dressing-room for chorus-singers, and of a floor underneath the stage, in which floor was a cut or hole, and along which floor the performers at the theatre were accustomed to pass from the said dressing-room to the back of the stage; that the plaintiff was hired by the defendant to sing on the stage as a chorus-singer; that it then became the defendant's duty to cause the floor to be so sufficiently lighted, and the hole so fenced, as to prevent accident to persons passing from the dressing-room to the stage; and that the defendant, well knowing the premises, suffered [*511

the floor to be insufficiently lighted, and the hole to be open without any sufficient fence, so that the plaintiff was injured by falling into the hole: and it was held, on motion in arrest of judgment, that the declaration was bad, because the facts stated did not raise the duty a breach of which was complained of, and that the express allegation of duty would not aid. Lord Campbell there says: "I confess that I at first thought, that, where a relation, from which a particular duty may arise, is alleged, and the particular *duty is also alleged, it might be shown in *512] evidence that in fact such a duty did arise, and that it was unnecessary to set forth the facts themselves which raise the duty. But the decisions show that the allegation of duty is in all cases immaterial, and ought never to be introduced; for, if the particular facts raise the duty, the allegation is unnecessary, and, if they do not, it will be unavailing." The 68th section of the 8 & 9 Vict. c. 20, imposes no duty upon the company to fence between the station and the railway.(*a*) The allegation of duty, therefore, is superfluous, and could not be traversed; and we have taken issue on the allegation that the accident occurred by reason of the defect of fences. The point reserved for the court is, whether the duty as alleged is put in issue.

Huddleston, Q. C. (with whom was *M'Mahon*), also moved for a new trial on the second and third counts, in the event of the plaintiff succeeding on the demurrer; or to enter the verdict for the defendants on the second count; or, for a new trial on the ground of misdirection, there being evidence for the jury, and the learned judge having refused to leave it to them; and also for judgment non obstante veredicto on the third plea. The second count stated that a certain bull of the plaintiff was lawfully in a close adjoining the defendant's railway, and along which railway there were no fences for preventing cattle being in the close from straying thereout upon the railway, and that the defendants, by their servants, negligently frightened and chased the plaintiff's bull, and caused it to go upon the line, where it was killed. Now, the evidence was, that on the arrival of the bull at the Wolverhampton station, it was put with other cattle in a yard *adjoining the railway, *513] where cattle were ordinarily left until taken away; that there was no fence between the yard and the railway; that the cattle arrived after the proper time; and that it was the practice of the company to leave the owners to take their own cattle from the trucks to the yard; and that a servant or porter of the company by incautiously holding a lantern before the beasts caused three of them to run upon the line. On the part of the plaintiff it was submitted that this was cogent evidence of negligence, for which the company were liable. There was no evidence on the other side; and yet the learned judge held that there was nothing to leave to the jury. The third count charges the defendants with negligence as common carriers. The plea to that count is, that the bull was delivered to the defendants to be carried subject to certain conditions, amongst others, that the defendants were to be free from responsibility in respect of any loss arising in the loading or unloading, from suffocation, from being trampled or bruised or otherwise injured in transit, from fire, or from any other cause whatsoever; and that the loss in the third count mentioned arose in and during the delivery of the bull by the

(*a*) See The Manchester, Sheffield, and Lincolnshire Railway Company, app., Wallis, resp., 14 C. B. 213 (E. C. L. R. vol. 78).

defendants to the plaintiff under the terms of the said conditions. Assuming that the defendants might protect themselves by a reasonable condition, they must be held strictly within the conditions they make. The plea alleges that the loss in question arose "in and during the delivery," but not that it occurred during the transit or the unloading. Suppose the transit commences with the loading and terminates with the unloading,—the company are not protected by the condition after the unloading. [WILLES, J.—The servants of the owner had the bull under their own charge after the unloading and delivery. This point can only help you, provided you are entitled to a verdict on the third count.] *The defendants are responsible for the cattle until they are [*514 delivered off their premises.

WILLES, J.—With reference to the motion of my Brother *Pigott*, I am of opinion that there ought to be no rule. As to the arrest of judgment, that course can only be necessary where the defendant stands in peril of the plaintiff's succeeding against him unless the judgment is arrested. But the defendants are in no such peril as this record now stands, because they have been allowed to demur to the first count of the declaration. The validity of the first count will be considered upon the argument of that demurrer. A judgment for the defendants upon the demurrer will be more advantageous for them than any judgment which could be pronounced upon this motion; because, in that case, the costs will follow the legal event; whereas, if we were to arrest the judgment, the defendants would get no costs, but would have to pay the plaintiff his costs of the issues upon which he succeeds. The rule to arrest the judgment, therefore, would be worse than useless. As to the other branch of my Brother *Pigott's* motion, viz., to enter the verdict for the defendants upon the first count,—that turns upon the effect of the plea. The count alleges that the defendants were possessed of a yard adjoining their railway, into and through which yard cattle brought by the railway to the station were accustomed and were of necessity obliged to pass in going from the station to the highway; and that, by reason of that juxtaposition, the defendants were bound to make and maintain good and sufficient fences between the said yard and the railway: it then goes on to say that the defendants did not fence in pursuance of that duty, and that, in consequence of that neglect of duty, and without any default on the part of the plaintiff, a bull belonging to the plaintiff, being lawfully in the yard on his way from *the station to the highway, strayed into and upon the railway, and [*515 was killed. To this the defendants plead not guilty. My Brother *Pigott* now contends that the plea of not guilty puts in issue, not merely whether the company made the fence or not, but also whether it was their duty to fence. It is plain that that cannot be so, if the count is sufficient in point of law. Not guilty merely puts in issue the fact of the performance of the duty as alleged. But my Brother *Pigott* says that there is no sufficient allegation of duty, and that not guilty puts everything in issue. I do not think it necessary to enter into the question whether or not the duty is sufficiently alleged. The inclination of my opinion is that it is not: but I shall reserve the consideration of that until the demurrer comes on to be argued. But, assuming that the count is an improperly constructed one, and that the duty is insufficiently alleged, the question is whether the rule of pleading which prevents the

putting in issue matter of inducement, is inapplicable to a declaration in which the duty the breach of which is charged is insufficiently alleged. I apprehend the rules of pleading are to be construed and applied without reference to the question whether the declaration is proper or not. If a declaration alleged that the plaintiff was possessed of a messuage, and of a right of way appurtenant thereto, and that the defendant obstructed the way, and the defendant pleaded not guilty,—that would put in issue only the alleged obstruction. I am quite satisfied that the meaning of the rule is as I have stated; and, from such experience as I have had, I cannot entertain a doubt that that is what is acted upon by pleaders. If any serious doubt upon the subject could be entertained, we should be disposed to grant a rule; but, as we cannot entertain any, there will be no rule.

*516] *As to Mr. *Huddleston's* motion, that raises some other questions for consideration. The second count is founded upon this, that a certain bull of the plaintiff was lawfully in a close adjoining a railway of which the defendants were owners, which railway was without fences, and that, whilst the bull was so in the close, a servant of the company alarmed the bull, and caused him to stray upon the railway, where he was killed. The facts seem to have sustained the count, if there was any evidence upon which the jury might find that the act of the servant was negligent. We think that is a point which is worthy of discussion. But, with regard to the third count, we think there should be no rule. The third count states that the defendants being carriers of cattle for hire, the plaintiff delivered to them as such carriers, and they as such carriers received from him, a certain bull, to be carried by them for him from Oswestry to Wolverhampton, and there delivered to him, and that, by reason of their negligence, the bull was lost. The third plea states that the bull was delivered to the defendants to be carried subject to certain conditions whereby the defendants were absolved from all responsibility in respect of loss or damage arising from injury in the transit, from fire, or from any other cause whatsoever. We need not enter into any question as to the validity of the plea; for, on not guilty, the plaintiff fails. It appears that the cattle were driven into the yard by the plaintiff's own servants; and that the company did nothing more than accommodate the plaintiff with the use of the yard for the purpose of placing the cattle therein. The count therefore charging the defendants as carriers wholly fails. The result will be, that my Brother *Pigott's* rule is altogether refused, and that Mr. *Huddleston's* rule is refused as to the third count, but granted as to the second.

*517] **Scotland* (with whom was *Pigott*, Serjt.), in support of the demurrer.(*a*)—The count alleges the obligation to fence between

(*a*) The points marked for argument on the part of the defendants, were,—

"That the facts stated in the declaration do not raise any such duty or obligation on the part of the defendants as that which is alleged:

"That there was no absolute obligation on the defendants to make and maintain a fence between the railway and the adjoining yard and station, of which the defendants were the owners and occupiers:

"And that, at most, the duty of the defendants was to provide a place reasonably safe and fitted for the unloading and delivery of cattle with proper care and management; and that the declaration did not show that the said station and yard were otherwise than reasonably safe and fitted for such purpose."

the railway and the yard as a positive duty on the part of the company. No such duty, however, is imposed upon them by the common law; and the duty imposed upon them by the 68th section of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20(*a*) is not more extensive than the common law *duty,—to fence against the lands of adjoining [*518 owners and occupiers: Ricketts *v.* The East and West India Docks and Birmingham Junction Railway Company, 12 C. B. 160 (E. C. L. R. vol. 74); The Manchester, Sheffield, and Lincolnshire Railway Company, app., Wallis, resp., 14 C. B. 213 (E. C. L. R. vol. 78). There is no allegation that the plaintiff's beast was in the station-yard under any contract with the company; and therefore the case falls within the principle laid down in Blackmore *v.* The Bristol and Exeter Railway Company, 27 Law J., Q. B. 167. That was an action by the administratrix of a man who was accidentally killed by the breaking of the chain of a crane of which the company allowed the gratuitous use to the owners of heavy goods carried at mileage-rates: and Coleridge, J., in delivering judgment, said: "As regards mileage goods, the crane was placed there in virtue of no contract with consignor or consignee, but just as any other convenience erected and allowed to be used by the public, in order to induce people to send their goods by the railway. A covered and convenient station is erected for passengers, but the purchase of a railway ticket would not entitle the passenger to an action if the station was uncovered or inconvenient.(*b*) He may be considered as licensed to use it, so as to excuse a trespass, but he has no greater right." It is consistent with this declaration, that the company were guilty of *no negligence whatever: there is nothing on the face [*519 of the declaration to show that the place was more than ordinarily dangerous: Toomey *v.* The London, Brighton, and South Coast Railway Company, 3 C. B. N. S. 146 (E. C. L. R. vol. 91).

Huddleston, Q. C. (with whom was *M'Mahon*), contrà.(*c*)—It seems

(*a*) That section enacts that "the company shall make and at all times hereafter maintain the following works for the accommodation of *the owners and occupiers* of lands adjoining the railway, that is to say,—such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of, or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof; also sufficient *posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers from straying thereout by reason of the railway*, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary styles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be:" and the section concludes with a proviso "that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive, and shall have been paid, compensation instead of the making of them."

(*b*) See In re The Caterham Railway Company, 1 C. B., N. S., 410 (E. C. L. R. vol. 87).

(*c*) The points marked for argument on the part of the plaintiff, were,—

"1. That the count is good in substance, inasmuch as it shows by necessary and reasonable intendment that it was the duty of the defendants to make and maintain fences between the yard and the railway, in order to prevent cattle, in passing from the station to the highway, from straying out of the yard on to the railway:

from the case of Ricketts *v.* The East and West India Docks and Birmingham Junction Railway Company, 12 C. B. 160 (E. C. L. R. vol. 74), that no statutable duty is cast upon the company by the 8 & 9 Vict. c. 20, s. 68, to fence against their own premises: but the common law imposes upon every person possessed of a place to which the public have a right of access the duty of making it reasonably safe. It is like the case of a trap-door in a shop. [WILLES, J.—There the public come by invitation.] So, here, the company are the owners of the yard, the place to which cattle are brought by the railway and left until they can be taken away. The company are bound to keep it in a safe and proper state. [CROWDER, J.—Whence arises the legal obligation on the company to fence between the yard and the railway?] They are bound to fence by reason of its being a dangerous place. [CROWDER, J.—The declaration does not allege it to be a dangerous place; nor does it show
*520] anything like a *cause of action. WILLES, J.—You do not even show that the bull was under the defendants' charge.]

Scotland was not called upon to reply.

CROWDER, J.—I am of opinion that this declaration is insufficient. It alleges that the defendants were the owners and occupiers of a certain railway, and of a certain station thereon for the landing, unloading, and delivery of cattle carried on and by the said railway, and of a certain yard adjoining the said station and railway, into and through which yard cattle carried and brought on and by the railway to the station were used and accustomed, and were of necessity obliged, to pass in going from the station to the highway; and that the defendants, by reason of the premises, ought to have made and maintained good and sufficient fences between the said yard and the railway, so as to prevent cattle lawfully being in the said yard from straying thereout into and upon the railway; and assigned for breach that the defendants did not make or maintain good, sufficient, or any fences between the said yard and the railway, whereby a bull of the plaintiff, lawfully being in the yard on the way from the station to the highway, without default or negligence on the plaintiff's part, strayed from the yard upon the railway, and was killed. I am of opinion that no legal liability is cast upon the company to make or maintain any fence between their station-yard and the railway. If it could be shown that the defendants had been guilty of any negligence in the performance of any duty cast upon them by law, no doubt an action would lie against them. But nothing of the kind is alleged. All that is stated, is, that the accident arose from the want of a sufficient fence between the yard and the railway: and, as no such
*521] duty is by law cast upon the *defendants, no ground of action is disclosed. There must, therefore, be judgment for the defendants upon this demurrer.

WILLES, J.—I am of the same opinion. It is quite consistent with this declaration that the bull was allowed to remain in the yard until it suited the convenience of the owner to take it away, and that it never was in the company's custody at all. It may be that there is some nicety in the question, arising from the circumstance of the defendants carrying on a dangerous trade: but it is unnecessary to go into that.

"2. That the allegation of such duty is an allegation of fact, and not simply an inference of law from the other facts previously stated in the count, and on these pleadings is admitted."

This declaration, being quite consistent with a state of facts which would give rise to no liability at all, is clearly bad.

Judgment for the defendants.

Huddleston, Q. C., and *M'Mahon*, were now called upon to support the rule to enter a verdict for the plaintiff upon the second issue.—The question here turns upon the second count, which states that the plaintiff's bull was lawfully in a close adjoining a railway of which the defendants were owners and occupiers, and along which railway they had not made or maintained any fences for preventing cattle being in the said close from straying thereout into or upon the railway, and that, whilst the bull was lawfully in the said close, the defendants and their servants negligently and wrongfully chased, startled, and frightened the bull, and so caused it to run upon the railway, where it was killed. To this there is a plea of not guilty only. The evidence was, that the bull, with other cattle which had been brought by the railway, being in the station yard, a place unlighted and unfenced from the railway, a porter came out of the office with a lantern in his hand, the light from which *startled some of the beasts, and caused three of them (the plaintiff's [*522 bull being one of them) to run upon the line, where they were killed by a passing train. Surely that was evidence from which the jury would have been warranted in holding that the company's servant had been guilty of negligence. The judge, however, thought there was *no* evidence, and nonsuited the plaintiff. [COCKBURN, C. J.—There was no evidence to show that the porter knew that there were cattle in the yard. And, if he had known it, would it have been prudent to go amongst them in a dark night without a light?] It was for the jury to say whether there was negligence or not. [COCKBURN, C. J.—There must be evidence of it.] It was evidence of negligence, that the cattle were left in an unfenced place. There would have been no necessity for the porter's lantern if the place had been properly lighted. The place being dangerous, there was the greater need of care and caution on the part of the servants of the company. It was upon the whole a question for the jury whether under the circumstances a reasonable degree of care had been used by the company's servants.

COCKBURN, C. J.—I am of opinion that this rule must be discharged. I think the learned judge was quite right in ruling that there was no evidence to go to the jury in support of the charge of negligence against the company. It appears that the cattle were placed in the station yard in their transit from the railway to the highway, and that, whilst they were there, a porter came from the office into the yard, in the ordinary course of the performance of his duty, carrying an ordinary porter's lantern in his hand, and that some of the beasts, the plaintiff's bull among others, frightened at the light, ran upon the railway, and got run over and killed. If it could have been shown that the *servant [*523 of the company had used the lantern in a negligent manner so as to alarm the cattle, there would have been a case to go to the jury. But it is not because cattle happen to be in the yard, that the porter is not to use the light which he is in the habit of using in the ordinary course of the performance of his duty. If, indeed, the man had come out into the yard without a light, and had in consequence run against and startled the bull, and so caused it to run upon the line, it might fairly have been said that he was guilty of negligence. I see nothing

in the evidence that could fairly lead to the conclusion that the porter made any other than a proper use of the lantern, or that there was any negligence on his part.

WILLIAMS, J.—I am entirely of the same opinion. If there was any ground at all for imputing negligence to the company, it was that they did not provide a reasonably safe and sufficient landing place for cattle brought by the railway to the Wolverhampton station. If that had been made out against them, and it had been shown that the bull had been frightened and killed by reason of the insufficiency of the landing place, the plaintiff might have established a well founded complaint. That, however, is not the charge here: it is that the porter was guilty of negligence in coming into the yard with a lantern whilst the cattle were there: and the plaintiff failed to substantiate that.

WILLES, J.—I am of the same opinion. The cattle had been delivered to, and were at the time of the accident in the custody of the plaintiff himself, and he ought to have taken care to prevent injury accruing to them from the lawful and ordinary acts of the company's servants, especially as he knew the yard was *unfenced, and had before intimated his opinion that it was a dangerous place. There was no evidence to show that the porter was acting otherwise than in the lawful and ordinary manner. The lantern he carried was the usual porter's lantern, and the place and the occasion justified its use.

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BYLES, J.—I cannot think that my Brother Watson was wrong in saying that there was no evidence of negligence here; and, that being so, it clearly was his duty to withdraw the case from the jury.

Rule discharged.

THE LONDON AND CONTINENTAL ASSURANCE SOCIETY *v.* REDGRAVE. *June* 4.

It is not competent to a shareholder in a completely registered joint stock company, who has executed the deed of settlement, with a recital therein that the whole number of shares have not been subscribed for, to defend himself against a claim for calls, on the ground that the directors have proceeded to carry on business with less than the stipulated amount of capital subscribed.

THIS was an action for calls. The declaration was as follows:—

"The London and Continental Assurance Society, the plaintiffs, being a joint stock company, and having obtained a certificate of complete registration, and duly incorporated and entitled to sue according to the statute 8 & 9 Vict. c. 20, intituled an 'Act for the registration, incorporation, and regulation of joint stock companies,' by, &c., sue, &c., for that the defendant, before and at the time of the commencement of this suit, as and being the holder of 125 shares in the said London and Continental Assurance Society, was and is indebted to the said society in the sum of 115*l.* for and in respect of certain instalments of capital then due and payable in respect of the said shares; and the defendant hath not paid the same; whereby an action *hath accrued to the said society to demand and have the same of and from the defendant: And the plaintiffs also sue the defendant for money payable by the defendant to the plaintiffs for the forbearance of moneys due and

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owing from the defendant to the plaintiffs and by them forborne to the defendant at his request for long spaces of time elapsed.

Third plea,—that the defendant, before the complete registration of the said company under the said act of parliament, subscribed for certain shares in a company to be called "The London and Continental Assurance Society," and which said company had been and then was provisionally registered under the said statute, and was a company the capital whereof was to be 100,000*l.* sterling in 10,000 shares of 10*l.* each; that the defendant never at any time subscribed for or consented or agreed to be the holder of any shares or share in any other company than a company whose capital and shares were to be of the amount and number thereinbefore mentioned; that he never was, and is not, a holder of any shares or share in the company in the declaration mentioned, except under and by virtue of the said subscription thereinbefore mentioned: That the said company so to be called The London and Continental Assurance Society, having complied with the requisites of the said act of parliament with respect to complete registration, afterwards became and was completely registered under the said act, and the same thereupon became and was and is the company in the declaration mentioned: That the said intended capital never was or could be raised, and that the said number of shares was never subscribed for or taken, but only a small part thereof, not amounting to two-thirds of the said number of 10,000 shares, and that the said company could not and did not at any time procure subscribers to or holders of any greater number of the said *proposed and intended shares than was thereinbefore mentioned, and that the company to which the defendant so subscribed [*526 as aforesaid *never was formed:* That the defendant never at any time after his said subscription for the said shares in the said intended company as aforesaid, agreed or consented that the said company should commence or carry on business with the said number of shares which had been so subscribed for as aforesaid, or with any less number of shares than the said proposed and intended number of 10,000 shares; and that he had never at any time derived or received any profit, emolument, benefit, or advantage whatsoever from the said company, or in respect of his having so subscribed for and agreed to hold such shares as aforesaid: And that the said interest in the declaration mentioned was claimed in respect of the said instalment of capital in the first count mentioned, and not otherwise.

Second replication to the third plea,—that this action was brought against the defendant as a shareholder of the said company, and for that the defendant, according to the provisions of the said act, executed the deed of settlement of the aforesaid company in respect of and as the holder of the said 125 shares in the said first count mentioned, which said number of 125 shares was and is expressed opposite to the defendant's signature and seal thereto; by which said deed, being an indenture made between the several persons (except the persons parties thereto of the second and third parts) whose names and seals were thereunto respectively subscribed and affixed, and who were thereinafter called "the subscribers," of the first part, Sir Charles Douglas of the second part, and Hew Dalrymple of the third part,—after reciting, amongst other things, that the subscribers had agreed to form a society or joint

*527] stock company for the purposes *thereinafter expressed, and to raise a capital of such amount and in such shares as thereinafter specified; and that each subscriber had taken one or more shares in the said capital, and the number or numbers of his share or shares was or were expressed opposite to his respective signature and seal thereto; and that, on the 8th of August, 1854, the society was provisionally registered, and it was intended to obtain the complete registration thereof under the acts of parliament for that purpose passed in the seventh and eighth years and in the tenth and eleventh years of the reign of her present Majesty,—in consideration of the premises, every subscriber (except the said Hew Dalrymple), but as concerning only the acts and defaults of himself, his heirs, executors, administrators, and not otherwise, did thereby covenant with the said Sir Charles Douglas (as a trustee on behalf of the said society), and with his executors and administrators, in manner following, that is to say,—that the subscribers, and such other persons as should thereafter become entitled to shares in the capital of the society (thereinafter called "the shareholders"), and each of them, would, when thereunto in accordance with these presents required, pay the amount of deposit and calls due upon his respective share or shares, and would perform, fulfil, and keep all the several engagements, obligations, and conditions therein contained, and in all other respects observe, conform to, and abide by the rules and regulations of the society,—and that the qualification of a director should be the ownership of not less than 100 shares in the capital of the said society, and that the defendant and divers, to wit, five others should be and were thereby appointed the first and the then directors of the said society, with power to add to their number as therein prescribed, until the first ordinary general meeting,—and that the directors should have *528] full *powers to allot and appropriate, upon such terms and conditions as they should think fit to prescribe as to recalling or cancelling any such allotments or appropriations of the shares of the capital of the society so far as the same had not been then taken or subscribed for, and having regard to the rights of all persons desirous of becoming shareholders, as the board of directors should approve, and to reserve for investment during a period of twelve months from the date of these presents such portion of the said capital, not exceeding 5000 shares, as the board of directors should think fit, and to reallot and reappropriate any share or shares the allotment whereof should be recalled or cancelled, as occasion might require, and from time to time to declare and make calls in respect of such shares, for such sums of money, to be paid at such times and in such manner as the board of directors should think fit, and that no call should exceed the sum of 1*l.* per share, and that a period of at least three months should intervene between the payment of any call and the payment of the next or the subsequent call,—and that, if any shareholder should fail to pay any call upon or in respect of his share or shares at the time appointed for the payment of such call, the board of directors should have power to sue such shareholder for the amount of such call in any court of law or equity, or other court having competent jurisdiction, and might recover the same, with interest after the rate of 5*l.* per cent. per annum, calculated from the day on which such call ought to have been paid: And that such deed of settlement, which was so executed by the defendant as aforesaid, contained no pro-

vision or condition that the said intended capital should be raised, or that the said number of shares should be subscribed for or taken, or a part thereof amounting to two-thirds of the said number of 10,000 shares, or prohibiting the said *company from commencing or carrying on business, as in the said third plea in that behalf alleged. [*529

To this replication, the defendant rejoined that the said company was completely registered under the said act of parliament in the declaration mentioned on the 18th of December, 1854; and that, on the 9th of January, 1855, the defendant resigned his office of director of the said company, and that such resignation was duly accepted, to wit, by the board of directors thereof, at a meeting of such board on the 22d of January, 1855; and that, from the time of his said resignation, he had not in any manner interfered in the concerns of the said company.

To this rejoinder the plaintiffs demurred, the grounds of demurrer stated in the margin being, that the "defendant's having ceased to be a director affords no answer to this action, which is against him as a shareholder; and, if it could be an answer, the defendant should have stated that he ceased to be a director before the calls were made or became due." Joinder.

Bovill, Q. C. (with whom was *Baylis*), in support of the demurrer.(*a*)—The real question is, whether, having signed the deed of settlement, the defendant can *defend himself against a claim for calls, on the ground that the company has proceeded to carry on business with less than the stipulated amount of capital subscribed for. It is submitted that he cannot. Before a joint stock company can be completely registered, there must be a deed of settlement: but the moment that is executed, the parties are incorporated and the company is formed. By the interpretation clause of the 7 & 8 Vict. c. 110, s. 3, par. 5, the word "subscriber" is declared to mean "any person who shall have agreed in writing to take or have taken any shares in a proposed company or a company formed, and who shall not have executed the deed of settlement or a deed referring thereto;" and par. 6 defines "shareholder" to mean "any person entitled to a share in a company, and who has executed the deed of settlement or a deed referring to it, or, in the case of mutual assurance societies, any person who shall be an assured member thereof." The defendant, therefore, clearly is a shareholder in this company. The 7th section enacts that "it shall not be lawful for any joint stock company hereafter to be formed for any purpose within the meaning of this act, &c., to act otherwise than provisionally in accordance with this act [s. 4], until such company shall have obtained a certificate of complete registration as hereinafter provided; and no joint stock company shall be entitled to receive a certificate of complete [*530

(*a*) The points marked for argument on the part of the plaintiff, were,—

"That the declaration and replication are good, and the plea and rejoinder bad, and that, inasmuch as it is admitted that the defendant executed the deed of settlement in respect of the shares for calls on which he is sued, he is properly sued in the statutable form of declaration by the plaintiffs, a completely registered company; but neither the act of parliament nor the deed prohibit the plaintiffs from suing the defendant for calls in consequence of all the capital not being raised or shares subscribed for, as alleged in the plea; and that the defendant's having ceased to be a director does not discharge him from his liability for calls as a shareholder, as pretended in his rejoinder; and that, even if it could, the rejoinder should have stated that he ceased to be a director before the calls became due."

registration unless it be formed by some deed or writing under the hands and seals of the shareholders therein," &c. Then the 25th section enacts, "that, on the complete registration of any company being certified by the registrar of joint stock companies, such company and the *531] *then shareholders therein, and all the succeeding shareholders, whilst shareholders, shall be and are hereby incorporated as from the date of such certificate, by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said company," &c. And then s. 55 enacts, "that, if any shareholder fail to pay any instalment of capital due upon or in respect of any share held by him, when the same shall become due, it shall be lawful for any such company, and they are hereby authorized, to sue such shareholder for the amount in an action of debt in any court having competent jurisdiction in respect of the same; and that, in the declaration in any such action, it shall be sufficient to state only that at the time of the commencement of the suit the defendant, as the holder of certain shares (stating how many) in a certain company or undertaking, as the case may be (naming it), was indebted to the company in a certain sum (stating the amount of the instalments, or so much thereof as is sought to be recovered), for certain instalments of capital then due and payable in respect of the said shares, and that the defendant hath not paid the same," &c. The defendant here is sued in the statutory form as a shareholder in an incorporated company. The answer the defendant attempts to set up, is, that, before the complete registration of the company, he subscribed for shares in a company the capital whereof was to be 100,000*l.*, in 10,000 shares of 10*l.* each; that two-thirds only of that number of shares were subscribed for; and that he never agreed or consented that the company should commence or carry on business with *532] less than the *number originally specified. The replication states that the action is brought against the defendant as a shareholder, that he executed the deed of settlement, and that the deed did not contain any provision or condition that the company should not commence or carry on business with any less number of shares subscribed than 10,000. [COCKBURN, C. J.—You contend, that, by executing the deed of settlement, the defendant shows his assent to the directors proceeding with less than the prescribed amount of capital?] The deed constitutes a new agreement. [COCKBURN, C. J.—Is there anything in the deed affirmatively giving the directors power to carry on the business of the company?] That does not appear upon this record. The original contract is superseded by the execution of the subscribers' agreement. This was decided in Watts *v.* Salter, 10 C. B. 477 (E. C. L. R. vol. 70), where Parke, B., in delivering the judgment of the Exchequer Chamber, says: "The plaintiff having executed the deed, has agreed under his hand and seal that the provisional directors shall do all that is therein contained; and by that deed he is bound, unless he was induced by fraud or misrepresentation to execute it. It has been contended that the directors had no power under the deed to deal with any part of the money until the whole amount had been subscribed. I do not, however, agree in that construction. If such had been the plaintiff's intention,

he should have taken care not to execute a deed which did not express it. No such express stipulation is to be found on the face of the deed: and none can be implied." The distinction between "subscriber" and "shareholder" is pointedly taken in the case of The Galvanized Iron Company *v.* Westoby, 8 Exch. 17.† The party exercises his option when he executes the deed. The 7th section of the 7 & 8 Vict. c. 110 contemplates that all the subscribers will not execute the deed.

**Field*, contrà.(*a*)—It is submitted,—first, that the defendant is not liable at all,—secondly, that he is at all events not liable to be sued in the statutory form. The plea alleges, and the replication admits, that the capital of the company was to consist of 100,000*l.*, in 10,000 shares of 10*l.* each; and then it goes on to allege that the defendant never agreed or consented that the company should commence or carry on business with any less than the proposed number of 10,000 shares. The defendant has a right to say that the company to which he proposed to become a subscriber never was formed at all. [[*533

COCKBURN, C. J.—It appears by the declaration that the defendant executed the deed, and that the deed contained a recital that the whole capital had not been subscribed, and it also contains an unqualified covenant to pay calls. Is there anything in the subsequent provisions to control that?] There is nothing in the deed, as set out in the replication, in terms controlling that covenant: but, on the other hand, there is nothing to show that the company was formed. [COCKBURN, C. J.—The deed starts with a statement that the whole number of shares had not been allotted; and in the mean time the parties agree that the concern shall go on. Suppose there had been no preliminary agreement, but that there had been nothing but this deed,—could it be said *that a party executing the deed did not thereby become liable to pay calls? The covenant is positive and not conditional on all the shares being subscribed for.] [[*534 It is submitted that the deed here is as much conditional as were the agreements in Pitchford *v.* Davis, 5 M. & W. 2,† and Fox *v.* Clifton, 4 M. & P. 676, 6 Bingh. 776 (E. C. L. R. vol. 19), 2 M. & Scott 146 (E. C. L. R. vol. 28), 9 Bingh. 115 (E. C. L. R. vol. 23). [COCKBURN, C. J.—There, the parties agreed to become members of an association upon a condition which was not performed. But here, the defendant waives his right to insist upon the entire number of shares being subscribed as originally proposed, and testifies that by executing the deed. Does it lie in his mouth afterwards to insist upon the condition? He knew when he signed the deed (for, the deed recites the fact), that the entire sum had not been subscribed.] At all events, the defendant is not liable in the statutory form. The proper remedy for non-payment of calls is, by action upon the covenant which is referred to in the replication. [BYLES, J.—That covenant does not supersede the right of action for calls expressly given by the statute.]

COCKBURN, C. J.—I am of opinion that our judgment must be for the plaintiffs. There is no doubt that this association was originally formed

(*a*) The points marked for argument on the part of the defendant, were,—

"That the plea is good and the replication bad; that it appears that the company to which the defendant subscribed was never formed, and that the defendant never consented to its concerns being carried on with a smaller capital than the one originally agreed on, and, under these circumstances, it will be contended that the defendant never became a shareholder, and is not liable for calls; and that, whatever might have been the case, had the action been upon the deed mentioned in the declaration, the plaintiffs cannot recover upon the present pleadings."

under an arrangement that its capital should consist of 100,000*l.*, in 10,000 shares of 10*l.* each, and that that number of shares was not subscribed for. But the defendant has thought proper to execute the deed of settlement of the company; and in that deed it is recited that "the subscribers had agreed to form a society or joint stock company for the purposes thereinafter expressed, and to raise a capital of such amount and in such shares as thereinafter specified," &c.; and then the deed contains provisions which clearly show, that, at the time of the execu-
*535] tion of the deed, all the parties thereto were *aware that the shares had not been subscribed for to the full extent originally proposed, but that, nevertheless, it was intended that the company should go on with such number of subscribers and such amount of capital as had already been obtained. That being so, and there being nothing in the deed to show either expressly or by implication that the directors were not to go on until all the shares had been taken up, but, on the contrary, it being manifestly contemplated that they should proceed at once, and as by the terms of the covenant the engagement on the part of the shareholders to pay calls is not made conditional upon all the shares being subscribed for, but it is absolute and unconditional, there is nothing upon this record to negative the defendant's liability. Without, therefore, in any respect interfering with the decisions,—to which I entirely assent,—which have established the non-liability of a party subscribing to an undertaking of this sort upon conditions which are not complied with, it seems to me that the defendant is liable to be sued for calls, and that in the form pointed out by the 55th section of the statute.

WILLIAMS, J.—I am of the same opinion. The company has obtained a certificate of complete registration, to obtain which the provisions of the 7 & 8 Vict. c. 110, s. 7, must have been complied with. That section requires, as a preliminary to complete registration, that the company shall be formed "by some deed or writing under the hands and seals of the shareholders therein." The defendant has executed that deed. He is therefore a "shareholder" within s. 8, and consequently a person liable to be sued for calls under s. 55.

WILLES, J.—Assuming that Mr. *Bovill* has failed to show that there
*536] are any provisions in the deed *authorizing the directors to proceed to carry on business without having the whole of the contemplated capital subscribed for, I think Mr. *Field* has also failed to relieve himself from the pressure of that part of the replication which alleges that the deed does not contain any provision or condition that the company should not commence or carry on business with less than 10,000 shares subscribed. Dickenson *v.* Valpy, 10 B. & C. 128 (E. C. L. R. vol. 21), 5 M. & R. 126, and that class of cases, are altogether inapplicable here, because in all of them there was an implied condition that the directors should not proceed without having obtained subscriptions for the stipulated amount of capital. Here, the replication shows that the defendant, when he executed the deed, knew that the whole number of 10,000 shares had not been subscribed for, without showing that there was any stipulation that the concern should not be commenced without the full capital. If it should turn out at the trial that the deed in extenso is inconsistent with what is stated in the replication, the defendant may succeed upon never indebted. But, upon the pleadings

as they appear before us on this demurrer, there must be judgment for the plaintiffs.

BYLES, J.—I am of the same opinion. It appears from the replication that the defendant has executed a deed which contains an express and unqualified covenant to pay calls. My Lord asked Mr. *Field* in the course of the argument, if there was any provision in the deed to restrain that covenant: but the learned counsel could not point out any part of the deed as set out on the record which restrains the generality of the covenant to pay. And, as to any part of the deed not set out, the replication alleges that there is no provision which expressly or impliedly prevents the directors from proceeding with the business of the society *with fewer subscribers than were originally contemplated. [*537 Upon these grounds, I am of opinion that the plaintiffs are entitled to our judgment. Judgment for the plaintiffs.

BAYLIS *v.* LE GROS and Others. *May* 28.

A general covenant to repair, and further to repair, within three months after notice from the lessor, are separate and independent covenants; and a right of re-entry attaches for a breach of the former, though no notice be given under the latter.

A lessor, finding the demised premises out of repair, intending to take advantage of a clause of forfeiture contained in the lease, entered into an agreement with an under-tenant whom he found there to let them to him as a yearly tenant, and subsequently received rent from him:—Held, a sufficient re-entry to avoid the lease.

THIS was an action of ejectment brought by the plaintiff by writ dated the 12th of February, 1855, to recover possession of a certain factory for the manufacturing, dyeing, and finishing of crapes, with the outhouses, buildings, yards, and other appurtenances to the same belonging, situate in the parish of Tottenham, in the county of Middlesex.

The defendants defended for the whole of the premises; and the cause came on for trial before Jervis, C. J., at the sittings at Westminster after Hilary Term, 1856, when a verdict was taken by consent for the defendants, subject to the opinion of the court upon the following case:—

By a lease of the said premises made the 28th of September, 1850, between one Stephen Barnewell of the one part, and James Baylis (the father of the plaintiff), of the other part, in consideration of the rents and covenants therein reserved and contained on the part of the said James Baylis, his executors, administrators, and assigns, to be paid and performed, he the said Stephen Barnewell demised and leased unto the said James Baylis, his executors, administrators, and assigns, the said premises, To hold the same unto the said James Baylis, his executors, administrators, *and assigns, from the 29th of September, 1850, [*538 for and during and unto the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended, determinable nevertheless as thereinafter mentioned, at the yearly rent or sum of 165*l.* 15*s.*, payable quarterly, on the four usual quarterly days of payment.

The lease contained, on the part of the lessee, his executors, administrators, and assigns, the usual covenant to pay the said rent, and also a

covenant to pay, or cause to be paid, during the continuance of the said term, the sewers-rate and all other taxes, rates, charges, and assessments whatsoever, parliamentary, parochial, or otherwise, which then were or thereafter should be imposed, charged, or assessed upon or in respect of the said premises, or any part thereof, or the rent thereof (the property tax only excepted); and also a covenant during the said term at his or their own costs and charges well and sufficiently to repair, uphold, support, amend, and keep the said premises, with the appurtenances, and every part thereof, in, by, and with all manner of necessary reparations and amendments when, where, and as often as the same should be requisite, and also to paint or cause to be painted in a good and workmanlike manner with two coats of good oil colour at the least twice during the first seven years, and afterwards once in every three years of the remainder of the said term, all the outside wood and iron work of the said premises, and such other parts thereof as should have been usually painted, and also to paint or cause to be painted in the manner aforesaid once in every seven years of the said term all the inside wood and iron work of the said premises, and such other parts thereof as should have been usually painted: And further that it should be lawful
*539] for the said Stephen Barnewell, his executors, administrators, *or assigns, with workmen or others, twice or oftener in every year during the said term, at reasonable and convenient times in the day time, to enter into and upon the said premises, or any part thereof (except any rooms where any secret process may be carried on by the said James Baylis, his executors, administrators, or assigns, in the way of his business), to view and examine the state and condition thereof, and, if found necessary upon such view and examination, to give to the said James Baylis, his executors, administrators, or assigns, or leave at or upon the said premises for him or them, notice in writing to repair and amend the same within three calendar months then next following, within which period of three calendar months the said James Baylis, his executors, administrators, and assigns, would repair, amend, and make good all such repairs and amendments as should be mentioned in such notice, according to the true intent and meaning of those presents.

The lease also contained a proviso as follows:—"Provided always, that if the said rents hereinbefore reserved, or any part thereof, shall be unpaid by the space of twenty-one days next after the same shall have become payable, being first lawfully demanded upon or at any time after the said twenty-one days, and not paid when demanded, or if the said James Baylis, his executors or administrators, shall assign, let, or underlet, or in any manner part with the possession of the said premises, or any part thereof, to any person or persons whomsoever, for the whole or any part of the term for which they are intended to be demised, without the license or consent of the said Stephen Barnewell, his executors, administrators, or assigns, in writing under his or their their hand or hands, first obtained for so doing, or if the said James
*540] Baylis, his executors or administrators, or any of them, *shall become bankrupt or bankrupts, or shall assign his or their estate or effects, or any part thereof, in trust for his or their creditors, or shall take the benefit of any act or acts of parliament passed or to be passed for the relief of insolvent debtors, or shall compound for the payment of his or their debts, or if any execution shall be levied upon his or

their goods or chattels, or if this indenture shall be sold by the sheriff under any execution to be levied as aforesaid, or *if he or they shall not perform the covenants herein contained* which by him or them ought to be performed,—then and in any of the said cases it shall be lawful for the said Stephen Barnewell, his executors, administrators, or assigns, into the said premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, retain, repossess, and enjoy as in his and their first or former estate."

The said James Baylis, the lessee in the said lease mentioned, carried on the business of a crape-finisher at the said premises until his death, and had thereon machinery and plant. He died on the 23d of October, 1850, having previously made a will, dated the 12th of October, 1850, whereby he gave and bequeathed the said premises, together with the said lease, unto his said wife, one Joseph Fletcher, and the plaintiff (on his attaining twenty-one years), his executors.

On the 14th of November, 1850, the widow, Rebecca, alone proved the will; the plaintiff being at the time of his father's death a minor.

The said widow, after the death of her husband, carried on at the same premises the business of a crape-finisher until her death in February, 1853.

On the 1st of June, 1851, and during the minority of the plaintiff, the said widow, Rebecca, having become indebted to the said Joseph Fletcher in the sum of 2500*l.*, by a deed of mortgage and assignment, *bearing date that day, assigned to the said Joseph Fletcher all the machinery, plant, steam-engine, implements of trade, and [*541 tenant's fixtures, stock in trade, household furniture, plate, linen, and other chattels (leases or terms for years excepted), with a proviso for redemption by and reassignment to her on repayment of the said sum of 2500*l.* and interest on the 4th of January then next, together with future advances not exceeding in the whole 3000*l.*

The machinery and other chattels assigned by the above-mentioned deed comprised the machinery and plant which belonged to the said James Baylis, deceased.

On the same day as the above assignment was executed, the said widow, Rebecca, by a separate memorandum deposited with the said Joseph Fletcher the said lease of the said factory, dated the 28th of September, 1850, as a further security for the repayment of the 2500*l.* and interest, and such further advances as aforesaid. The said memorandum was by an error dated the 1st of June, 1850, instead of the 1st of June, 1851.

On the 22d of June, 1852, the plaintiff came of age; but he did not come in to prove (according to leave reserved) his father's will until February, 1855, as hereinafter mentioned.

On the 1st of November, 1852, the said Joseph Fletcher died, having previously made a will, whereby he appointed certain persons executors (hereinafter called Fletcher's executors), to whom he bequeathed all his property. Fletcher's executors duly proved his will immediately after his death.

The widow, Rebecca, died intestate, in February, 1853. Letters of administration to her estate were taken out by the plaintiff on the 21st of December, 1854, as hereinafter mentioned.

*542] Shortly before and on the 24th of October, 1853, the *premises were dilapidated and out of repair, so as to be a breach of the following covenant, that is to say,—"And also will during the term hereby granted, at his and their own costs and charges, well and sufficiently repair, uphold, support, amend, and keep the said premises, with the appurtenances, and every part thereof, in, by, and with all manner of necessary reparations and amendments, when, where, and as often as the same shall be requisite, during the said term, and also will paint or cause to be painted in a good and workmanlike manner with two coats of good oil colour at the least twice during the first seven years of the said term, and afterwards once in every three years of the remainder of the said term, all the outside wood and iron work of the said premises, and such other parts thereof as shall have been usually painted; and also will paint, or cause to be painted, in the manner aforesaid, once in every seven years of the said term, all the inside wood and iron work of the said premises, and such other parts thereof as shall have been usually painted."

The sum of 7*l.* 18*s.* for poor-rates in respect of the premises, upon a rate made on the 17th of June, 1853, was unpaid on the 24th of October, 1853.

The sum of 3*l.* 18*s.* 4*d.* for rates in respect of the premises made by the local board of health for the parish of Tottenham on the 10th of September, 1852, viz., the highway-rate and the general district rate, and the sum of 8*l.* 4*s.* 9*d.* for similar rates made on the 23d of September, 1853, were unpaid on the 24th of October, 1853.

The sum of 1*l.* 19*s.* 6*d.* for church-rates made in respect of the premises, upon a rate made the 26th of August, 1853, was also unpaid on the 24th of October, 1853.

*543] The said Stephen Barnewell was called at the trial, *and stated, that, on the 24th of October, 1853, he,—having first inspected the said premises with his attorney, and after consulting him, and knowing that the premises were then out of repair, and that the rates were unpaid,—made a verbal agreement with the defendants, whereby it was agreed that the defendants should occupy the said premises as tenants to him, Barnewell, until Lady-Day, 1854, conditionally, that is, provided that the defendants should complete a contemplated purchase from Fletcher's executors of the plant, machinery, &c., then in and upon the said factory and premises, the defendants paying to the said Barnewell rent at the rate of 150*l.* per annum, and paying the premiums of insurance in respect of the said factory and premises, and agreeing to let the said S. Barnewell know on or before the 10th of January, 1854, whether the defendants were desirous of continuing the tenancy for another year after Lady-Day, 1854.

The said S. Barnewell, in reply to the question, "How came you to let the premises to the defendants?" said,—"I let them with the intention of decidedly putting an end to the lease, and taking possession." This question was objected to on the part of the plaintiff; but the learned judge decided to receive the evidence, subject to the objection. The witness further stated that the defendants were in possession of and used the fixtures in and upon the premises before the said 24th of October, 1853, but not till that day with his license; that the first rent

the witness received from the defendants was on the 3d of February, 1854; and that he had received it regularly from that time.

The defendants occupied the premises under such agreement until Lady-Day, 1854; and the following *correspondence took place between the said S. Barnewell and the defendants:— [*544

"Coventry, October 29th, 1853.

"Messrs. Le Gros & Co.

"Gentlemen,—In your letter you do not say whether you arranged about the balance of insurance against the old tenants. I cannot afford to lose it, having paid the amount. Upon receiving a letter from you stating you will pay it,—say 12*l.*,—I will consent for you to be tenant from Michaelmas last to Lady-Day next, upon the terms stated, to inform me January 10th whether you should wish to continue tenant. Upon receipt of your letter, I will write Mr. Jury to walk over and see that the condition of the lease has been complied with, and then release Fletcher's representatives, and hold you as tenant for the term stated. Your paying me, as agreed, insurance from August to Lady-Day, and rent also, will bring matters near the same thing: still, I prefer matters to go on as talked over with you when in London.

"STEPHEN BARNEWELL."

"Walton-under-Edge, 1 November, 1853.

"Dear Sir,—Your favour of the 29th ult. has been forwarded to me here. I did not forget what you had said to me as to the balance, between 11*l.* and 12*l.*, against you in the matter of insurances, when we made our final agreement with Fletchers: but, being told by Mr. Pearce, that, if we did not buy the plant from them, they would remove it in time to avoid the payment of this current quarter's rent, and then he would consider it quite right to evade the payment of anything else he could legally in connection with the said plant, I saw it would be quite useless to make any allusion to your claim. We are willing to pay the rent and the insurance from Michaelmas last to Lady-Day next, at the rate Baylis paid you, and engage to state *before the 10th of January next whether we wish to continue your tenants. I would [*545 have been pleased in being of assistance to you in recovering what Fletcher or Baylis owe: but I could not be quite so pleased in having to pay it ourselves; nor do I think it would be just. Moreover, we are striving to bring down current expenses at Tottenham: and, if we are successful to a sufficient extent, we would find it very much more convenient to our trade to stay there than removing of the finishing to this place, which is about one hundred miles from the warehouse. You must not think of burthening us with Baylis's or Fletcher's arrears of debts."

"LE GROS, THOMPSON & BIRD."

"Coventry, November 3d, 1853.

"Dear Sirs,—I have no wish that you should pay me for other people's debts. At the same time, I think you will excuse me asking you to fulfil your promise at any rate, viz., to pay the 16*l.* insurance to Lady-Day and the rent for the half-year from Michaelmas to Lady-Day. It is all very well for Mr. Pearce to talk of evading rent or any other just payments: but I can only say, that, if you do not occupy it, I shall take such proceedings at law as I am advised to do. I have before told

you that they cannot part with or give possession without my consent; and, as to his removing before quarter-day to avoid rent, if I thought he would do so, I would put in Chancery and get an injunction against such proceedings. If, however, I understand your letter that you will pay the rent and insurance to Lady-Day next from Michaelmas, that is all I can ask you: but be pleased to observe the insurance must be the amount agreed, 16*l.* The insurance afterwards can be regulated according to agreement, that is, if you would like to continue as tenants, notice to that effect being given January 9th next ensuing.

"S. BARNEWELL."

*546] *By an assignment dated the 5th of November, 1853, Fletcher's executors assigned to the defendants all the plant, machinery, &c., comprised in the before-mentioned assignment, dated the 1st of June, 1851, with the exception of the furniture and household linen.

On the 9th of January, 1854, the defendants gave Barnewell notice of their intention to quit the premises at Lady-Day, 1854.

The following correspondence passed between Barnewell and the defendants:—

"Coventry, January 10, 1854.

"Messrs. Le Gros & Co.

"Gentlemen,—I have received your notice: and, as you are not likely to want the premises, I should be glad if you would allow me a board 'To let' to be hung on the chimney-shaft. It may perhaps get me a tenant by Lady-Day; and I hope it will, as I do not like empty houses. I shall be glad also to receive your check for the quarter's rent and insurance, as agreed,—

Say, half-year's rent	41	8	9
Half of insurance, as agreed to Lady-Day, 1854 - .	6	0	0
	£47	8	9

"S. BARNEWELL."

"Coventry, February 3d, 1854.

"Gentlemen,—I enclose receipt for rent in part due St. Thomas last; and shall be obliged by your interest in letting the factory.

"S. BARNEWELL."

"Coventry, March 2d, 1854.

"Gentlemen,—As I have not taken any steps at present towards letting the premises you now hold, I shall be glad to hear from you as
*547] early as convenient *whether you accept the last terms offered you, or whether it is your intention to leave on the 25th instant.

"S. BARNEWELL."

Barnewell also stated, that, between the 2d and 21st of March, 1854, he verbally agreed to let to defendants the said premises for another year; and the defendants continued tenants to Barnewell for such year, and thenceforward, and paid rent to Barnewell up to the time of the trial.

The following correspondence also took place between Barnewell and the defendants:—

"Coventry, March 21, 1854.

"Dear Sirs,—The amount due to me, according to agreement, this 25th of March, is 57*l.* 8*s.* 9*d.*, which includes the 16*l.* agreed to be paid for insurance to the above. From the 25th March, I will insure for 2000*l.* on the buildings, &c., instead of 3000*l.*, as formerly, you paying the amount I pay to the office, above the 150*l.* for rent of factory: and, if you will insure your stock in the same office, the Imperial, I shall be glad. I am interested in its welfare; and I believe you cannot find one more highly respectable. S. BARNEWELL."

"London, 22d March, 1854.

"Dear Sir,—We have yours of yesterday's date. We are very willing to favour the Imperial, if there is any gain in it: but, as it is agreed we should effect the insurance for 2000*l.* (see your letter to us, 8th February last) we shall to-morrow ascertain what the Imperial will charge, and what the Lancashire (in which we have some interest) will charge; and, as they are both undeniably good and safe, the cheapest shall have it. "LE GROS, THOMPSON & BIRD."

"Coventry, March 31st, 1854.

"Gentlemen,—Your check 40*l.* 13*s.* 9*d.* is at hand, which will leave a balance on your agreement of *8*l.* 17*s.* 6*d.* As follows is a copy of my memorandum taken in your own warehouse:— [*548

"Half-year's rent to Lady-day, 1854			75 0 0
"Insurance to that time			16 0 0
			91 0 0
"Cash received	80 13 9		
"Income-tax	2 3 9		
			82 17 6
"Balance . . .			£8 2 6

"S. BARNEWELL."

"Coventry, July 28, 1854.

"Dear Sirs,—My rent-book is always at my residence at Camden; and I have written to you from my warehouse. This will account for the apparent discrepancies. The memorandum made in my books at your own warehouse was as follows:—'Messrs. Le Gros will pay the rent Baylis is paying, to Lady-Day, and 16*l.* insurance; and to inform me in January about its continuance.' A second memorandum,—'Messrs. Le Gros & Co. will continue on the premises till Lady-Day, 1857, at 150*l.*, and insurance for 2000*l.*' Is the above right or not? If you imagine for one moment that I should allow you to occupy my premises without insuring, you are mistaken. No reasonable man could expect it. The premises are insured to Michaelmas at the rate of 15*l.* 15*s.* per annum, which sum must be paid by you. As to Baylis's correspondence, if you refer again, you will find the rent was to be 150*l.*, the insurance 15*l.* 15*s.* for 3000*l.*, as stated by Mr. Baylis, but which afterwards turned out 22*l.* 4*s.* 9*d.* This was explained to you before, and ought not to require it again. I shall be glad to receive a check for the amount of rent and insurance due Midsummer last.

"S. BARNEWELL."

*549] *Mr. Pearce was also called on behalf of the defendants at the trial, who stated that he acted as solicitor for Fletcher and his executors, and in particular for the executors in negotiating for the before-mentioned assignment of the plant, &c., by Fletcher's executors to the defendants, dated the 5th of November, 1853: and he also stated that he held, as such solicitor, the original lease before mentioned, but that no act was ever done to take possession of the premises, but that it was purposely avoided, and that the defendants declined to take the lease, and that there was never any arrangement between the defendants and Fletcher's executors about the premises themselves.

On the 11th of December, 1854, the plaintiff became and was duly adjudged to be a bankrupt.

On the 21st of December, 1854, the plaintiff took out letters of administration to the estate of his mother; and, on the 24th of February, 1855, he obtained probate of his father's will.

The court were to draw inferences as a jury.

The question for the opinion of the court, is, whether, under the circumstances of the case, the plaintiff is entitled to succeed in the said action of ejectment. If the court should be of opinion that the plaintiff is so entitled, then the verdict is to be entered for the plaintiff; otherwise, the verdict is to stand for the defendants.

C. Wood (with whom was *Montague Smith*, Q. C.), for the plain-
*550] tiff.(a)—There has been no breach of *covenant so as to work a forfeiture; and, if there has been, Barnewell never took advantage of the forfeiture, or did anything that was equivalent to a re-entry. In order to establish the alleged forfeiture, the defendant must rely upon a breach of the covenant to repair or to pay rates, or on the bankruptcy of the plaintiff. As to the want of repair,—no forfeiture accrues by reason of the breach of a covenant for repairs framed like this. [COCKBURN, C. J.—If the lessee is bound to repair, independently of the inspection and notice, the forfeiture clearly attaches upon the premises being suffered to be out of repair.] The obligation to repair presupposes a want of repair. Does a forfeiture arise the first moment that the premises are out of repair? If not, it follows that the lessee must have a reasonable time for doing the repairs. [COCKBURN, C. J.—The lessee covenants to repair and keep in repair the premises demised,

(a) The points marked for argument on the part of the plaintiff, were,—

"1. That the facts stated in the case do not amount in law to any forfeiture of the lease of the 28th of September, 1850, either by reason of non-repair, the non-payment of rates, &c., or the bankruptcy of the plaintiff:

"2. That the mere fact of the premises being out of repair, without notice to repair and amend, as provided for in the lease, would not in law enure as a forfeiture:

"3. That it does not appear in the case that there were any arrears of rates due on the 24th of October, 1853, or that the rates so stated to be then unpaid, were unreasonably overdue; and that therefore in law there was no forfeiture by reason of the same being unpaid, as therein stated:

"4. That there could be no forfeiture in 1853, by reason of the plaintiff's bankruptcy, as it did not occur till December, 1854:

"5. That if, by reason of any of the above causes, a forfeiture accrued before the 24th of October, 1853, yet the facts do not show that Barnewell did anything to take possession of the premises in consequence of the same, or anything which would in law put an end to the lease:

"6. That the facts show, that, if even this was a forfeiture in October, 1853, yet that Barnewell waived such forfeiture, by subsequently receiving the rent reserved in the said lease from the defendants or others in possession of the premises:

"7. That the lease of the 28th of September, 1850, is still in full force."

and there is a power to the lessor to *enter and view the state of the premises, and to give the lessee notice of any want of repair, and a further covenant by the lessee to do the repairs within three months after notice,—do you say that the first covenant is merely introductory of the second?] The whole constitutes one covenant. [WILLIAMS, J.—It is settled law that these are separate covenants: Roe d. Goatly *v.* Paine, 2 Campb. 520; Doe d. Morecraft *v.* Meux, 4 B. & C. 606 (E. C. L. R. vol. 10), 7 D. & R. 98 (E. C. L. R. vol. 16)]. Bayley, J., says, in Doe d. Morecraft *v.* Meux,—"The landlord in this case had an option to proceed on either covenant, and, after giving notice to repair within three months, he might have brought an action against the defendant upon the former covenant, for not keeping the premises in repair. But that is very different from insisting upon the forfeiture." [COCKBURN, C. J.—He treats the two as independent covenants.] The court was only considering whether or not the forfeiture was waived. In Horsfall *v.* Testar, 7 Taunt. 385 (E. C. L. R. vol. 2), 1 J. B. Moore, 89 (E. C. L. R. vol. 4), it was held that a covenant to repair at all times, when, where, and as often as occasion should require during the term, and at furthest within three months after notice of want of reparation, is one covenant; and it cannot be stated as an absolute covenant to repair at all times when, where, and as often as occasion shall require during the term. [COCKBURN, C. J.—There, the whole clearly formed one entire covenant.] Wood *v.* Day, 7 Taunt. 646, 1 J. B. Moore, 389, rather looks the other way: but the case is distinguishable from the present, inasmuch as there the term was ended; here, it is still subsisting. In Sicklemore *v.* Thistleton, 6 M. & Selw. 9, the plaintiff demised a messuage and farm to J. T. at a rent payable quarterly; and the defendant covenanted that J. T. should pay the rent and observe the covenants, and that, in case J. T. should neglect to pay the rent for forty days, the defendant would pay on *demand: and it was held that the defendant was not chargeable until after forty days, and demand made. Lord Ellenborough says: "I cannot help thinking this is a qualified covenant, and that the stipulation, that, 'if the lessee shall neglect to pay for forty days, the surety shall pay on demand,' which must have been introduced in ease and for the protection of the surety, does, in reasonable construction, pervade and restrain the former covenant." [COCKBURN, C. J.—None of us entertain a shade of doubt. Doe d. Morecraft *v.* Meux, 4 B. & C. 606 (E. C. L. R. vol. 10), 7 D. & R. 98 (E. C. L. R. vol. 16), and Wood *v.* Day, 7 Taunt. 646 (E. C. L. R. vol. 2), 1 J. B. Moore 389 (E. C. L. R. vol. 4), are distinct authorities to show that the covenant to repair, and the covenant to repair within three months, are separate and independent covenants. Independently of authority, we should have felt no doubt.] Assuming that to be so, still there is nothing in this case to show any forfeiture has been incurred. To constitute a forfeiture for non-repair, a reasonable time must be given for doing the repairs: Doe d. Baker *v.* Jones, 5 Exch. 498.† There is no allegation here that a reasonable time had elapsed. [COCKBURN, C. J.—Is not that necessarily involved in the statement that "shortly before and on the 24th of October, 1853, the premises were dilapidated and out of repair, so as to be a breach of the covenant?"] There is nothing to show *how long* the premises have been out of repair. [COCKBURN, C. J.—They are said to have been in a state of dilapidation: to be so, they

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must have been out of repair for a considerable time. That is the fair inference from the statement.] The law always leans against forfeitures. [COCKBURN, C. J.—I have yet to learn that the law altogether disregards the interest of the landlord. I must confess, I see no hardship in the forfeiture being insisted upon here.] Then, has the landlord taken advantage of the breach? Barnewell says, that, on the *553] 24th of October, 1853, *knowing that the premises were out of repair, and that the rates were unpaid, he made a verbal agreement with the defendants that they should occupy the premises as tenants to him until Lady-Day, 1854: and, in reply to the question,—"How came you to let the premises to the defendants?" he said,—"I let them with the intention of decidedly putting an end to the lease, and taking possession." The court cannot take notice of the *intention* with which an act is done. Besides, Barnewell's subsequent correspondence with the defendants shows that he did not on the 24th of October, 1853, intend to treat the lease as no longer subsisting. It is to be observed, too, that no notice of this dealing with the under-tenants was given to the lessee.

Bovill, Q. C. (with whom was *C. Pollock*), for the defendants.(*a*)—[WILLIAMS, J.—How did the defendants originally come in? *Wood.*—The fact does not appear in the case: but it must be assumed that they came in under the plaintiff. CROWDER, J.—The landlord being entitled to re-enter upon a forfeiture, lets the premises to a tenant whom he finds there, and receives rent from him. Is not that a taking advantage of the forfeiture?] The case states, that, "between the 2d and 21st of *554] March, 1854, Barnewell verbally agreed to *let to the defendants the said premises for another year, and the defendants continued tenants to Barnewell for such year, and thenceforward, and paid rent to Barnewell up to the time of the trial." [COCKBURN, C. J.—That is conclusive.]

COCKBURN, C. J.—I am clearly of opinion that a forfeiture has been incurred here. The lease in question contains a general covenant by the lessee, his executors, &c., to repair and keep the premises in repair; and also a covenant that it should be lawful for the lessor, his executors, &c., to enter at all convenient times to view the condition of the premises, and to give the lessee notice of any want of repair, requiring him to do such repairs within three months, and that the lessee, his executors, &c., should within that period repair accordingly. These two covenants are quite separate and independent. The authorities are all clear to that effect; and they coincide with the common sense of the thing. It would indeed be monstrous, if, giving credit to his tenant that he will duly perform his engagement, the landlord abstains from harassing him with continual inspection, and then should find himself debarred of his remedy for a breach of a positive covenant. I cannot entertain the slightest doubt that there has been a forfeiture here. As to the

(*a*) The points marked for argument on the part of the defendants were as follows:—

"1. That, at the commencement of this action, the plaintiff had no such title to the premises in question as would enable him to maintain it against the defendants:

"2. That the covenants of the lease from Barnewell to the plaintiff's father were broken; that a right of re-entry accrued to Barnewell; and that he duly exercised such right:

"3. That there was a forfeiture of such lease, and that the forfeiture has never been waived:

"4. That the acts of Barnewell and those claiming or acting under him amounted to a determination of the lease."

entry also, my mind is equally free from doubt. Finding the premises in a dilapidated state, the landlord comes upon them and enters into an agreement with a man he finds in possession, to become his tenant,—intending thereby to act upon the forfeiture and to oust the lessee. I think that was quite sufficient to constitute an entry by the landlord so as to put an end to the lease.

WILLIAMS, J.—I am quite of the same opinion. Roe *d. Goatly *v.* Paine, 2 Campb. 520, is distinctly recognised in Doe [*555 d. Morecraft *v.* Meux, 4 B. & C. 606 (E. C. L. R. vol. 10), 7 D. & R. 98 (E. C. L. R. vol. 16); and the two cases together show that the law is clearly settled, that the general covenant to repair, and also to repair within a certain time after notice, are separate and independent covenants. Such has undoubtedly been the understanding of the profession for several years.(*a*) As to the other point, if Barnewell had entered and desired the person he found upon the premises to go out, and then desired him to resume possession as his tenant, the case would have been clear beyond all doubt.(*b*) They did not go through that idle ceremony: but the facts set out in the special case show a re-entry by the landlord, and something more.

CROWDER, J.—I also am clearly of opinion that the general covenant to repair, and the covenant to repair after a three months' notice, are separate and independent covenants. I never heard it doubted before. If Mr. *Wood* is desirous of questioning the propriety of the decision in Doe d. Morecraft *v.* Meux, he must do so in a court of error. Then it is said there has been no re-entry. The landlord, however, is in and occupying the premises by a tenant who is paying him rent. I think that is the strongest possible case of entry.

Judgment for the defendants.

(*a*) See Woodfall's Landlord and Tenant, 7th edit. by Horn, 93; Smith's Landlord and Tenant, by Maude, 201.

(*b*) See Doe d. Baker *v.* Coombes, 9 C. B. 714 (E. C. L. R. vol. 67).

*CORBY *v.* HILL. *May* 25. [*556

The owner of land having a private road for the use of persons coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission, by placing a quantity of slates there in such a manner that the plaintiff in using the road sustained damage:—Held, that A. was liable to an action.

Held also that the declaration was not objectionable for not averring that the obstruction was placed on the road without permission; inasmuch as such an allegation, if traversed, would have presented an immaterial issue.

THIS was an action against the defendant for negligently leaving certain slates upon a certain road, whereby the plaintiff's horse was injured.

The declaration stated, that, before and at the time when, &c., the plaintiff was lawfully possessed of a certain carriage, and of a certain horse drawing the said carriage, which said horse and carriage were under the government and direction of a servant of the plaintiff, and which said horse and carriage were then, with the consent of the owners and occupiers of the land and road and carriage line thereinafter mentioned, during the night-time, under such care and government as afore-

said, lawfully in and lawfully being driven along certain land and a certain road or carriage line, part of and crossing the said land then belonging to and occupied by certain persons other than the plaintiff and the defendant, and leading to a certain public building known as the Hanwell Lunatic Asylum, for the purpose of proceeding to the said building; that the defendant then negligently, carelessly, and improperly kept and continued upon and across the said road or carriage line, part of the said land, a stack of slates, and divers other things and materials, without placing or keeping any light or signal near them, or adopting any means whatever to show that the said slates and other materials were upon or across the said land, road, or carriage line; by reason whereof it was then impossible for the servant of the plaintiff to see or avoid the said slates, materials, or other things; and that, by reason thereof, the said horse drawing the said carriage, while being
*557] driven by the said servant as aforesaid, ran into, upon, *and against the said stack of slates or other materials and things, and was greatly bruised, wounded, and injured: special damage.

The fourth plea stated that the defendant had lawfully placed, kept, and continued the said slates and other things and materials across the said land and road or carriage line by the license of the owners and occupiers of the said land, road, or carriage line, before the consent of the owners and occupiers of the said land, road, or carriage line as in the declaration alleged; and that the said consent so given to the defendant was in full force at the time when, &c.; and that the alleged damage was not sustained by any breach of duty of the defendant. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after the last term. The facts which appeared in evidence were as follows:— The carriage-road or way in question was a private road leading from the turnpike-road to the Hanwell Lunatic Asylum and to the residence of the superintendent, Dr. Saunders. The defendant, a builder, was employed to do certain work at the asylum, and, with the consent of the owners of the land, stacked certain slates and other materials upon a portion of the road, without taking the precaution of placing a light near them at night; in consequence of which, the plaintiff's servant, who was driving a horse and carriage along the private road to the residence of Dr. Saunders, not seeing the slates, drove against them, and seriously injured the horse.

In answer to questions put to them by the learned judge, the jury found that the defendant had the consent of the owners of the property for placing the slates and materials where he placed them, but upon the usual terms of properly providing for the safety of the public, or of such
*558] of the public as had permission to *use the way; that there was negligence in leaving the stack without a proper light; and that that negligence was chargeable upon the defendant, in conjunction with the owners of the soil.

It was insisted, on the part of the defendant, that the fourth plea was an answer to the action.

The learned judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him upon the fourth plea, if the court should be of opinion that the action would not lie under the circumstances.

Huddleston, Q. C., now moved to enter a verdict for the defendant pursuant to the leave reserved, or to arrest the judgment. The declaration discloses no cause of action; or, at all events, the fourth plea, with the finding of the jury thereon, affords a complete answer. [COCKBURN, C. J.—If the proprietors of the lunatic asylum hold out a road to such of the public as have occasion to go there, it hardly lies in their mouth to say that they could place or permit another to place thereon an obstruction calculated to render the way dangerous.] Stone *v.* Jackson, 16 C. B. 199 (E. C. L. R. vol. 81), comes very near this case. There, in an action for an injury to the wife of the plaintiff through the negligence of the defendant in leaving an open vault or cellar on his own premises unfenced, whereby she fell in and was injured,—the evidence was, that many persons were in the habit of going across the spot where the vault was, for the purpose of making a short cut from a street to the main road, by avoiding an angle, but that the owner of the premises, as often as he saw them, turned them back: and it was held that the defendant was not liable. [WILLIAMS, J.—The plaintiff was not a trespasser here, as the woman was in that case.] In Deane *v.* Clayton, 7 Taunt. 489 (E. C. L. R. vol. 2), 1 J. B. Moore *203 (E. C. L. R. vol. 4),—the dog-spear case, where the law was much considered, but without any definite result to the parties,(*a*)—Dallas, J., in the course of a very elaborate judgment, thus propounds the law: "If I place a log across a public path, and injury be thereby sustained, the soil being my own, but the public or individuals having a right of way over it, an action will lie, because there is a right in others to pass along without interruption; but, if there be no right of way, I may with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained. So, in the case put, of a ditch, I may not dig it so as to interfere with any public or private right; but, within the limit of my own property adjoining a common, and not separated from it by any actual fence, I may dig a ditch, however wide; and man or beast sustaining harm, having no right to be there, no action will lie. Such was the case cited, of the horse straying from the common and falling into the pit,(*b*) and in which it was determined that no action would lie, first, because the owner had a right to do what he pleased with his own land, and next, that the plaintiff could show no right for the horse to be there; and yet that a horse might, in the night or day, stray from an open common into adjoining land, not separated by any fence, was, as a probable consequence, as much to be foreseen as that a hare might spring up, and a dog chase; or, if the horse had escaped from the owner, and he had sustained damage in the pursuit, would *that have given him a right to damages for the consequences of an escape, which he ought in strictness to have prevented? I may not keep a mischievous bull in a field through which there is a right of way; but, when there is no right of way, I am entitled so to do, as was stated by Lord Kenyon

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(*a*) Except that the plaintiff retained his verdict, the court, on a motion for a new trial, being equally divided in opinion.

(*b*) Blithe *v.* Topham, 1 Roll. Abr. *Action sur Case* (N), translated, 1 Vin. Abr. 554, pl. 4; Cro. Jac. 158.

in one of the cases cited at the bar,(a) and this, by way of illustration, for the very purpose of showing the distinction in question. The only case cited on this part of the subject as bearing the other way, is that of Townsend v. Wathen, 9 East 277; but in facts and circumstances it has no resemblance to the present. The object in the former was, to attract, in order to destroy the dog; and in this, the immediate purpose was to keep the dog from a situation in which he might incur destruction. In Townsend v. Wathen, the enticement was made to operate beyond the line of the defendant's property, and to the destruction of the dog where the dog had a right to be; and this enticement constituted the foundation of the action. It is, in effect, but the common case of nuisance. But no decision has established that a trap placed by a man in his own land, and not calculated to operate so as to allure beyond, or even within the limit of such land, would be a trap unlawfully placed." Jordin v. Crump, 8 M. & W. 782,† supports the same view. [COCKBURN, C. J.—These cases are a long way off the present. Suppose the owner of the premises himself places the obstruction upon a road which he holds out as the access to his house,—could he justify it?] That, it is submitted, is not this case. [COCKBURN, C. J.—I think it is. The place where these slates and rubbish were negligently stacked and left was the way commonly used by all persons having lawful occasion to go to the house.] *561] The fourth plea alleges that *permission was given to the defendant to place the slates where they were deposited before the permission given to the plaintiff to use the way. Suppose this had been a new district, with a road in the course of formation, and a person lawfully proceeding along it fell into a hole on the side of it, would he have any remedy? [BYLES, J.—Yes, if there was a right of way there: Barnes v. Ward, 9 C. B. 392 (E. C. L. R. vol. 67).(b)] In Deane v. Clayton, Gibbs, C. J., says: "Considering the case upon the general principles of law, I conceive, that, as far at least as civil rights are concerned, every man may guard his own land by any means he pleases, provided he does not thereby invade or interfere with the legal rights of others. I know it is a rule of law that I must occupy my own so as to do no harm to others; but it is their legal rights only that I am bound not to disturb." What legal right of the plaintiff did the proprietors of this asylum invade when they gave the defendant permission to place his slates upon the road in question? [WILLIAMS, J.—In that case, as in Jordin v. Crump, the only question was, to what extent a man may employ dangerous means for the purpose of protecting his own property: those cases have nothing whatever to do with the principle which must govern this case. COCKBURN, C. J.—We all entertain a very strong opinion against you upon this point. What have you to urge in arrest of judgment?] The declaration does not allege that the slates were improperly placed upon the land without the consent of the owners, nor does it state anything to show that they were placed there under circumstances which imposed upon the defendant any duty towards the plaintiff or any other person who might obtain permission to use the way in *562] question. *[WILLIAMS, J.—The declaration shows that the plaintiff was lawfully using the way with the permission of the

(a) Brock v. Copeland, 1 Esp. N. P. C. 203.

(b) See Hardcastle v. The South Yorkshire Railway and River Dun Company, 4 Hurlst. & N. 67.†

owners, and that he sustained an injury from the defendant's negligence.] In Southcote *v.* Stanley, 1 Hurlst. & N. 247,† the declaration alleged that the defendant was possessed of an hotel into which he had invited the plaintiff to come as a *visitor*, and in which there was a glass door, which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff by the permission of the defendant and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in a proper condition to be opened; and that, by and through the mere carelessness, negligence, and default of the defendant, the door was then in an insecure and dangerous condition and unfit to be opened, and by reason of the said door being in such insecure and dangerous condition, and of the then carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff: and it was held that no cause of action was disclosed. [COCKBURN, C. J.—There, the declaration charged no act of commission: here it does.]

COCKBURN, C. J.—I am of opinion that there should be no rule in this case. This action is brought by the plaintiff on the ground that whereas there was a road leading from the main or turnpike road to the Hanwell Lunatic Asylum and to the residence of Dr. Saunders adjoining thereto, and the plaintiff, having lawful occasion to be on the land, was on it by the leave and license of the owners thereof, the defendant negligently obstructed the way by placing thereon certain slates and other materials without giving notice or warning of the obstruction by light or other signal, and that, by *reason thereof, the plaintiff's horse was driven against the obstruction, and injured. To this [*563 declaration the defendant, by his fourth plea,—not denying the leave and license stated in the declaration,—says that the slates and materials were placed on the road by the license of the owners and occupiers of the land before the consent given to the plaintiff to use the said road, that the consent so given to the defendant was in full force at the time of the accident, and that the injury complained of was not the result of any breach of duty on his part: and it has been contended by Mr. *Huddleston* that the owners of the soil, and consequently also any person having leave and license from them, may, as against any other person using the way by the like leave and license, erect an obstruction thereon without incurring any responsibility for injury resulting therefrom, unless in the case of a holding out any allurement or inducement to such other person to make use of the way. It seems to me that the very case from which the learned counsel seeks to distinguish this, is the case now before us. The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question: they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. Could *they* have justified the placing an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation? Clearly they could not. Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent to them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to

*564] whom they had held it out as a way along which *they might safely go. If that be so, a third person could not acquire the right to do so under their license or permission. The case is entirely distinguishable from those which have been referred to. In those, the plaintiff was in the position of a wrongdoer, a trespasser: whereas, here, the plaintiff was at the time he sustained the injury complained of in the course of using the way upon the invitation of the owners of the soil. We must take it as the jury have found it, that, though the defendant had the leave and license of the owners of the soil to place the slates upon the road, such license was to be exercised with reasonable precautions and a due regard to the safety of all persons using the way. I doubt whether the finding of the jury might not have been objected to. I incline to think, that, where a general leave and license is given to use a road as a means of access to a certain place, any subsequent leave to place an obstruction there would be inoperative, and therefore I think the evidence does not justify the finding upon the fourth plea. But the jury having coupled it with a finding that the leave granted to the defendant was to be exercised with a due regard to the protection of the public, we must presume it to have been so qualified. I therefore think there is no ground for disturbing the verdict. Then comes the question whether there is anything to entitle the defendant to have the judgment arrested. The ground upon which that is sought, is, that the declaration does not show that the obstruction complained of was erected without the permission of the owners of the soil. I am of opinion that it was not necessary that the declaration should allege that. It was enough for the plaintiff to aver that there was a road which he was entitled, as of right, or by the owners' permission, to use, and that the defendant negligently and improperly placed an obstruction thereon, whereby the plaintiff sustained an injury.

*565] *It was altogether unnecessary for the plaintiff to go on and negative the fact of permission having been given to the defendant by the owners of the soil; for, it was not to be presumed that they would have done that which would have been in fraud of the leave and license granted to the plaintiff.

WILLIAMS, J.—I am of the same opinion. As to the arrest of judgment,—The declaration in effect avers that the plaintiff was lawfully using a certain road leading to the Hanwell Lunatic Asylum, and that the defendant did an act which rendered it impossible for the plaintiff to use the road without encountering peril. It alleges that the defendant did this negligently, carelessly, and improperly, and that amounts to an allegation that he did it without any lawful excuse. After verdict, at all events, it must be assumed that the judge told the jury that the declaration must be construed in a sense which would make it good,—that the act of the defendant was without excuse arising from ignorance or misadventure or inevitable necessity. I see no reason why the plaintiff should not have a remedy against such a wrongdoer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy, and there is no authority against it. All the cases referred to, with one exception, are cases where the question has been as to the remedy which a trespasser has for an injury resulting to him from the manner in which the proprietor of the land has dealt with it. They therefore have nothing

to do with the case before us, where the plaintiff is not a trespasser. The case of Southcote *v.* Stanley, 1 Hurlst. & N. 247,† I conceive, stands entirely upon the relation of host and guest, and was decided upon this principle, that one who chooses to become a guest *cannot complain of the insufficiency of the accommodation afforded him. [*566 As to the objection that the declaration does not allege that the defendant placed the slates, &c., on the road without the leave or license of the owners of the soil,—it seems to me that that was wholly unnecessary. If the declaration had contained such an averment, and the defendant had traversed it, the issue would have been an immaterial one. If the act was an improper one, it would be no answer to say that it was done with permission. Then, as to the plea,—it is neither more nor less than an expanded plea of not guilty: and I think the jury were quite right in the view they took of it. In the very nature of the thing, the permission given to the defendant was a qualified one,—so to place the slates as to provide against the possibility of danger arising therefrom to persons lawfully passing along the way. Again, I think the evidence failed to support the latter allegation in the plea, that the alleged damage was not sustained by any breach of duty of the defendant. The defendant clearly was guilty of a breach of duty in so placing and leaving the slates as to expose persons using the road to danger.

WILLES, J.—I am of the same opinion. In substance the case is this:—There was a road leading to a certain building, along which road persons having occasion to go to the building were accustomed to pass by leave of the owners of the soil, and were likely to pass; and the defendant, being engaged in some work upon the adjoining land, obtained leave to place slates and other materials there, either absolutely or modified in the way found by the jury, so as not to endanger persons using the road. Under that leave, the defendant placed certain slates across the road in such a way as to be likely to occasion injury to *persons using the *road. It is not suggested that the defendant did not know that the road was likely to be used in the way I have mentioned, or that he gave any notice or warning to the persons, including the plaintiff, who were accustomed and likely to use the road. The question is, whether there is any legal remedy for a person lawfully using the road, to whom injury results from the act of a third person in negligently placing an obstruction upon the road. I should have thought that the bare statement of the proposition was enough. The defendant had no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury. That is so obvious that it is needless to dwell upon it. The form of declaration which I should have drawn upon such a state of facts, would have been something like this,—that there was a certain road over which the plaintiff and others having occasion to go to a certain building by license of the owners were accustomed and were likely to pass, and that the defendant, knowing that, wrongfully and negligently placed certain slates and materials across the road in such a manner as to be likely to prove dangerous to persons driving along the road, and that the plaintiff, being lawfully on the road on his way to the building, ran [*567

against the obstruction and was injured. The objections urged by Mr. *Huddleston* assume that the present declaration does in substance state all these facts. As to the fourth plea, it seems to me that the defendant failed to prove that he had the leave and license of the owners of the soil to place the slates across the road in the way he did. I also think there is no ground for arresting the judgment. The declaration, as I read it, discloses a perfectly good *cause of action, and is not open to any of the objections urged against it. It is true it does not allege that the defendant had knowledge of the way in which the road was used. But it is perfectly clear that he did know it, and therefore the declaration would at once be amended if it were necessary. But, after the remarks of my Brother Williams, the absence of that allegation would not I think make the declaration bad.

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BYLES, J.—This case presents this singular aspect, that, though there was evidence on both sides, there was no contradiction. At the trial, it seemed to me to be a very clear case. If this way had been a public highway, and the defendant had placed an obstruction upon it, no action would have lain for that unless some individual had sustained an injury therefrom. It seems to me that the rule of law is precisely the same in respect of a private way, whether by prescription or by license. If the exercise of that right be obstructed, the party injured thereby has a right of action, just the same as if the way had been a public one. The qualification of the license set up by the defendant was introduced by the jury: I did not put it to them; for, I did not consider it any part of the case. If the obstruction was placed upon the road with the unqualified leave of the owners of the soil, all persons contributory to the injury sustained by the plaintiff therefrom would be jointly and severally responsible to him for it. As to the declaration, I have nothing to add to what has fallen from the rest of the court.

Rule refused.

In Frees *v.* Cameron, 4 Richardson 228, the clerk of the defendant, who was a retail dealer, took a customer into a dark part of the store, where there was a trap-door, which had been negligently left open, and through which she accidentally fell; and it was held that the defendant was liable in an action on the case, because he, by the nature of his business, held out an invitation to the public to come upon his premises, and was therefore bound to keep them in a safe condition for that purpose. But no action will lie for an injury sustained by one while on the land of another, without any authority or license, express or implied, at least where that injury is occasioned by what was a lawful use by the latter of his property. Therefore a person who digs a cellar on his own land, near a highway, is not liable for an injury to one who in wandering from the line of the road falls into the cellar, though there was no fence or light to warn or protect him against the danger: Howland *v.* Vincent, 10 Metcalf 373. In Birge *v.* Gardiner, 19 Connecticut 507, however, the defendant had set up a gate upon his own land, by the side of a lane along which the plaintiff with other children were in the habit of passing on their way to school. The plaintiff, without permission, took hold of the gate and shook it, in consequence of which it fell on him and broke his leg. It was held that if the defendant had been guilty of negligence, he was liable, unless the plaintiff had been guilty of negligence or misconduct beyond

mere childish thoughtlessness. In this case, and in Johnson *v.* Patterson, 14 Connecticut 1, it was considered, in opposition to the English spring-gun and dog-spear cases, that a man would not be justified in the use of dangerous or deadly means to protect himself against trespassers, whether with or without previous notice, and that he would be liable for any injury occasioned thereby. On the other hand, in White *v.* Twitchell, 25 Vermont 620, the plaintiff had without authority carried off a piece of timber belonging to the defendant, which he used in setting up some staging: the defendant came and removed his timber, which rendered the staging insecure, so that the plaintiff going upon it afterwards, it fell and injured him severely. It was held that the defendant was not liable, and that he was not bound to give notice to plaintiff of the removal of the timber.

There can be no doubt, of course, of the liability of one who causes an obstruction or makes an excavation in a public way, though one which passes over his own land, by which an injury is occasioned to another; and the same rule applies *à fortiori* to municipal corporations, whose duty it is to keep the highway in proper condition: see Beatdsley *v.* Swann, 4 M'Lean 333; Beatty *v.* Gilmore, 16 Pennsylvania St. 463; Myers *v.* Snyder, Brightly's R. 489; Mayor, &c., of Memphis *v.* Lassen, 9 Humphrey 757; Kimball *v.* Battle, 38 Maine 113; Storrs *v.* Utica, 17 New York 103. But with respect to the latter, where the injury has been caused by a mere temporary obstruction in a street, by a private citizen, as by the deposit therein of building materials or the like, it has been held that the corporation is not liable unless its officers had actual notice of the obstruction: Griffin *v.* Mayor, &c., of New York, 3 Seldon 456. This decision, however, does not seem in all respects satisfactory; at least it deserves consideration whether want of actual notice is material where the officers would, by proper attention to their duties, have acquired knowledge of the obstruction. See on this subject Gibbs *v.* Trustees of Liverpool Docks, 3 Hurlst. & Norm. 164.

*HIRSCH and Others *v.* JOHN CONRAD IM THURN and Another. *June* 3. [*569

By a contract for the sale of a parcel of white Bombay sessame seed (paid for on receipt of the shipping documents), "warranted when shipped of fair merchantable quality, and equal to the fair average," it was provided that any dispute arising out of the contract should be settled in London by the usual mode of arbitration, but that the contract should not be void on that account. An action having been brought by the buyers to recover damages for the breach of warranty, the declaration in which alleged that the plaintiffs had sustained damage by having resold and converted a great part of the seed into oil before they discovered or could reasonably discover the breach of warranty,—the court stayed the proceedings, under the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, there being nothing on the record to show that any question of fraud could arise, and nothing in the affidavits to show such an alteration of circumstances as to induce the court to withdraw the matter from the mode of investigation which the parties themselves had selected.

On the 20th of March, 1857, the defendants, through Messrs. Laing & Campbell, colonial brokers, entered into a contract for the sale to

the plaintiffs of a parcel of sessame seed. The sold note was as follows:—

"London, March 20th, 1857.

"Sold for account of Messrs. J. C. im Thurn & Co., to our principals, S. W. B. 4906 bags of sessame seed, shipped at Bombay per the 'Bombay,' Capt. Flamank, and warranted when shipped of fair merchantable quality and equal to the fair average of white Bombay sessame seed, at 62*s.* 6*d.* per qr. the cost free on board, the freight, insurance, and bags to London included. The quantity to be computed at the invoice weight, taking the bushel at 49 lbs., unless it should be found to weigh more, and then the real weight to be taken. Twenty sound bushels to be weighed on arrival, to ascertain the weight; and the amount of invoice to be paid in fourteen days from the ship's reporting, by cash, less 2½ per cent. discount, in exchange for shipping documents and freight release. Buyers to have craft alongside for the seed as soon as it is come-at-able, or it is to remain at their risk and expense. *Any dispute arising out of this contract to be settled in London by the usual mode of arbitration; but this contract not to be void on that account.* This contract to be void for any portion that may be lost at sea or not arrive.
*570] *Any damage arising on the passage at buyer's risk. Brokerage and guarantee 1 per cent. LAING & CAMPBELL."

The sessame seed the subject of the above contract having arrived in London, the plaintiffs made a claim upon the defendants for 1513*l.* for a breach of the contract by reason of the alleged inferiority of the quality of the seed. The defendants disputed the claim, and proposed to refer the matter to arbitration under the clause for that purpose contained in the contract.

On the 30th of October last, this action was commenced. The declaration (which was delivered on the 28th of May) stated that the defendants, by warranting that certain goods, to wit, 4906 bags of sessame seeds, shipped at Bombay, per the "Bombay," Captain Flamank, were, when shipped, of fair merchantable quality, and equal to the fair average of white Bombay sessame seed, sold the same goods to the plaintiffs on the terms, amongst others, that the contract should be void as to any portion that might be lost at sea or not arrive; and, although the said goods were not lost at sea, and did arrive, yet the said goods were not when shipped of fair merchantable quality or equal to the fair average of white Bombay sessame seed, and the shippers of the said goods had fraudulently shipped white Bombay sessame seed mixed with other and inferior seed, and with an unusual quantity of dirt and rubbish, and the goods so shipped were the goods so sold and warranted to the plaintiffs, and were, by reason of such fraudulent conduct, not so sold and warranted; by means of which premises the plaintiffs, who paid for, resold, reshipped, and caused to be manufactured into oil a great part of the said goods before they discovered or could reasonably discover the said
*571] breach of warranty, sustained a great loss on the said goods, *to wit, &c., the said goods having been bought by the plaintiffs for such purposes, as the defendants always well knew.

Honyman, on behalf of the defendants, who had appeared to the action, but had not pleaded, moved to stay the proceedings, under the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict.

c. 125.(a) The affidavit upon which the motion was founded stated that the action was brought in respect of matters which were by the contract agreed to be referred to arbitration, and the only matters in question in this cause were, the quality of the seed, and the *amount of the allowance (if any) to be made to the plaintiffs for the alleged [*572 inferiority of the said seed; that no sufficient reason existed why such matters could not or ought not to be referred to arbitration in the manner provided for by the contract; that the defendants before and at the time of the commencement of the action were and always had been desirous and ready and willing to refer all disputes arising out of the said contract to arbitration in the manner provided for in the contract, and to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration; and that the well-known and usual mode of arbitration was, for each party to name a colonial broker or other competent referee, and for the two referees thus named to appoint another colonial broker or other competent person as third referee, or umpire. [COCKBURN, C. J.—There being a suggestion of fraud, ought not the matter to be submitted to a jury?] If there had been a bonâ fide suggestion of fraud as between the parties to the contract, the court would not interfere: see Wallis *v.* Hirsch, 1 C. B. N. S. 816 (E. C. L. R. vol. 87). But no fraud is charged here; merely a breach of contract. Fraud is imputed only to the shippers of the seed.

H. James, at the call of the court, showed cause, upon an affidavit which stated, that, about four or five weeks before the arrival of the seed in this country, Mr. Page, of the firm of Laing & Campbell, through whom the contract was made, told the plaintiffs that he (Page) had been informed by one of the defendants that they were afraid that the sessame seed would not be white, but mixed, but requested them not to take any notice of such information until its arrival; that, in June, 1857, the defendants offered to deliver to the plaintiffs shipping documents of 4906 bags of sessame *seed ex 'Bombay,' which the defendants repre- [*573 sented to consist of white Bombay sessame seed of the quality described in the said contract, whereupon the plaintiffs paid the defendants the sum of 5365*l.* 10*s.*, being the amount of the invoice delivered by the defendants in respect of the goods comprised in the said shipping documents; that, upon examination of the said seed, the plaintiffs found that it was not white Bombay sessame seed, but was mixed in so large a proportion with black and brown sessame seed and dirt as to be quite a

(a) Which enacts, that, "whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which [such] action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit; Provided always that any such rule or order may at any time afterwards be discharged or varied as justice may require."

different article, and useless to the plaintiffs for the purposes for which they bought it; and that the plaintiffs verily believed, that, at the time the defendants so as aforesaid invoiced the said goods to them, and represented the same to be in accordance with the contract, they, the defendants, knew that the same was not white Bombay sessame seed. *James* submitted that this would be a very inconvenient case to refer. [COCKBURN, C. J.—Why, then, did you so agree?] The court has a discretion: and, from the frame of the declaration, it is manifest that difficult questions may arise as to the plaintiff's claim for damages, involving the principle in Hadley *v.* Baxendale, 9 Exch. 341.† [COCKBURN, C. J.—Is there anything in the affidavits to show that the defective quality of the seed was not discernible whilst it existed in specie and before it was converted into a new substance?] There is not; but the declaration so avers. Colonial brokers may be very proper persons to judge of the quality of seed; but may not be very fit to refer a question such as is likely to arise here to. [COCKBURN, C. J.—If it were clear that the inferiority of the quality of the seed was not discovered by the plaintiffs until after it had been converted into oil, there would be much weight in your argument, because a party might well be content to refer a dispute as to the quality of an article in its *natural
*574] state, to one with whose judgment of the thing in its manufactured state, he would not be satisfied. But here you state that the objection was brought to your notice while the subject-matter of the contract still remained in specie. I cannot see that any injustice will be done by carrying out the agreement which the parties have entered into.] At all events, the court will not in the exercise of its discretion enforce a reference, where the inquiry involves a charge of fraud. It was upon that ground the court discharged the rule in Wallis *v.* Hirsch, 1 C. B. N. S. 316 (E. C. L. R. vol. 87). [COCKBURN, C. J.—There it was distinctly brought to the notice of the court that the plaintiffs meant to charge fraud. BYLES, J.—In that case there was a count for money had and received, under which the plaintiffs sought to recover back the money which they had paid, on the ground of fraud.]

COCKBURN, C. J.—I am of opinion that the rule should be absolute. The contract upon which the action is brought contains a clause whereby it is provided that any dispute arising thereout shall be settled in London by the usual mode of arbitration,—that is, by colonial brokers. The contract relates to a parcel of sessame seed: and the ground upon which it is suggested that the court ought not to act upon the power conferred upon it by the 11th section of the Common Law Procedure Act, 1854, is, that, before the vendees ascertained the defective quality of the seed, they had converted a considerable portion of it into oil, and therefore it is contended, that, although the parties to whom it had been agreed to refer any dispute that might arise out of the contract, might be perfectly conversant with the quality and value of the article in the state in which it was contracted to be sold, they might not be so well acquainted with
*575] the quality and *value of the article into which it has been converted. It may be, that, if the whole of the seed in question had been converted into oil, there might have been great weight and cogency in the argument founded upon that suggestion. But Mr. *James* has been constrained to admit that there still remains a portion of the cargo which has not been so converted into oil, but which is still in the

form of seed: and there is nothing upon the affidavits to satisfy us that the brokers would not be perfectly capable of judging of the whole parcel by that which remains. The parties having, therefore, by their contract expressly agreed to withdraw all disputes and differences arising out of the contract from the ordinary tribunals, and to refer them to a tribunal specially selected by themselves, we ought to give effect to that agreement unless we are satisfied that the circumstances are so altered that justice cannot be done by carrying out the original intention of the parties. So far from thinking that such is the case here, I see no reason whatever for supposing that the brokers would not be perfectly capable of arriving at a correct decision, so that justice may be done in the manner agreed upon by the contracting parties. The only other point for consideration, is, whether a question of fraud is raised here, so as to make the matter more fit to be determined by a jury. But it does not appear upon the declaration that any question of fraud can arise directly or indirectly. And that distinguishes this case from Wallis *v.* Hirsch, 1 C. B. N. S. 316. I think the rule should be absolute, but without costs.

The rest of the court concurring,

Rule absolute, without costs.

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*FREND and Another *v.* DENNETT. *June* 9. [*576

By the 85th section of the Public Health Act, 11 & 12 Vict. c. 63, it is, amongst other things, enacted that "the local board of health may enter into all such contracts as may be necessary for carrying the act into execution; and every such contract, whereof the value or amount shall exceed 10*l.*, shall be in writing, *and sealed with the seal of the local board,*" &c.:— Held, that a contract which did not comply with this condition is not capable of being enforced.

THIS was an action brought by the plaintiffs, Messrs. Frend & Hamill, contractors, against the defendant as clerk to the local board of health of the town of Worthing,—a non-corporate district,—to recover the price of certain works done by them for the board.

The first count of the declaration stated, that, by certain articles of agreement duly made and entered into by and between the plaintiffs of the one part, and the said local board of health of the other part, the plaintiffs did covenant and agree with the said local board to build, erect, construct, and complete for the said local board a water-tower, engine and boiler-house, chimney, coal-store, fitting-shop, and all other works that should be required by the said local board, and expressed in a certain specification, and as shown in certain drawings, and according to the same and certain plans and sections, at and for the respective sums of 1761*l.* and 955*l.*, and also to execute and perform all such additional works thereto as might be required by the said local board; and the said local board did thereby covenant and agree with the plaintiffs, that they the said local board would pay or cause to be paid unto the plaintiffs the said several sums of 1761*l.* and 955*l.* for the building, erecting, constructing, and completing the said water-tower, engine and boiler-house, chimney, coal-store, fitting-house, and other works as expressed in the said specification, and shown in the said drawings, plans, and

sections, and would also pay or cause to be paid to the plaintiffs all such further sums (if any) as should become justly due or payable to the plaintiffs for or in respect of additional works, in accordance with the
*577] said specification, at certain times, *and according to a certain scale, and in manner then agreed upon between the said local board and the plaintiffs: Averment, that the plaintiffs did build, erect, construct, and complete the said water-tower, engine and boiler-house, coal-store, and fitting-shop, and all such other works as were required by the said local board, and expressed and shown in the said specification and drawings, and according to the same and the said plans and sections, and did also execute divers additional works thereto which were required by the said local board; that, at the time of the commencement of this suit, a large sum of money, to wit, 300*l.*, had become and was justly due and payable to the plaintiffs from the said local board for and in respect of such additional works, and in accordance with the said specification and the said covenant and agreement of the said local board; and that, although the said local board did pay to the plaintiffs the said sums of 1761*l.* and 955*l.* for and in respect of the building, erecting, constructing, and completing the said water-tower, engine and boiler-house, chimney, coal-store, fitting-shop, and such other works as were expressed in the said specification, and shown in the said drawings, plans, and sections, and although the plaintiffs had done all things, and all things had happened and occurred, and all conditions precedent had been performed and fulfilled, and all necessary times had elapsed, to entitle the plaintiffs to be paid by and to receive from the said local board the said sum of money for or in respect of such additional works as aforesaid, yet the said local board had not at any time paid the same, or any part thereof.

The second count stated, that the said local board retained and employed the plaintiffs to do, execute, and perform for them the said local board certain sewerage and drainage works as mentioned and expressed
*578] *in a certain specification; that the said local board did thereupon contract and agree to and with the plaintiffs to pay them for the same at and after certain rates thereupon agreed upon between them the plaintiffs and the said local board; that the said local board did also then contract and agree with the plaintiffs to pay them in cash for the first 500*l.* worth of such work, subject to a certain deduction, and also that, in case they the said board did not pay in cash for the work executed in excess of the said 500*l.*, they would give to the plaintiffs at the end of each month a bond or negotiable security for the amount of work executed during the month, for periods expiring five years from the date of such document, bearing interest at 5*l.* per cent.; and that the said local board did also then contract and agree with the plaintiffs, that certain then-existing sewers should be kept clear of water by the board: Averment, that the plaintiffs did execute and perform such sewerage and drainage works for the said local board, and that the price and value of the same much exceeded the sum of 500*l.*, and that, although the said local board did pay to the plaintiffs in cash for the first 500*l.* worth of such work, yet, at the time of the commencement of this suit, there was, and still remained, justly due and owing from the said local board to the plaintiffs, beyond and in excess of the said sum of 500*l.*, a large sum of money, to wit, 800*l.*, for and on account of such

works; and that, although the plaintiffs had done all things, and all things had happened and occurred, and all conditions precedent had been performed and fulfilled, and all necessary times had elapsed, to entitle the plaintiffs to be paid the said last-mentioned sum of money, either in cash or by such bonds or securities as aforesaid, yet the said local board had not paid the same in manner aforesaid or otherwise howsoever; and further, that the said *local board did not nor would keep the said existing sewers clear of water according to their said contract and agreement, but wholly omitted so to do, by means whereof the plaintiffs were not only greatly hindered and impeded in performing and executing the said sewerage and drainage works, but also thereby the same were rendered much more difficult of execution, and the plaintiffs were put to and incurred much additional expense, labour, and trouble in executing the same than they would otherwise have incurred, and were forced and compelled to and did necessarily leave on the said works so executed by them divers large quantities of timber and other materials of great value, and which would not have been necessary if the said existing sewers had been kept clear of water by the said board according to their said contract and agreement. [*579

There was also a count for money payable by the board to the plaintiffs for work done and materials provided by the plaintiffs for the said local board, and at their request.

The defendants pleaded a great number of pleas to each count, and amongst them a plea that they did not covenant and agree as alleged.

The cause was tried before Willes, J., at the sittings in London after Hilary Term last, when a verdict was found for the plaintiffs, subject to leave reserved to the defendants to move to enter the verdict for them upon certain points of law, one of which was, that the contract, being for a sum exceeding 10*l.*, and not being under seal, was void by the 85th section of the Public Health Act, 11 & 12 Vict. c. 63.

That section enacts "that the local board of health may enter into all such contracts as may be necessary for carrying this act into execution; and every such contract, whereof the value or amount shall exceed 10*l.*, *shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof, and (in the case of a corporate district) sealed with the common seal; and shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed; and shall fix and specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed; and every contract so entered into, and duly executed by the other parties thereto, shall be binding on the local board by whom the same is executed, and their successors, and upon all other parties thereto, and their executors, administrators, successors, or assigns, to all intents and purposes: Provided always, that the said local board may compound with any contractor or other person in respect of any penalty incurred by reason of the non-performance of any contract entered into as aforesaid, whether such penalty be mentioned in any such contract or in any bond or otherwise, for such sums of money or other recompense as to such local board may seem proper: Provided also, that, before contracting for the execution of any works under the provisions of this act, the [*580

said local board shall obtain from the surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner, as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise: Provided also, that, before any contract of the value or amount of 100*l.* or upwards is entered into by the said local board, ten days' public
*581] notice at *the least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same; and the said local board shall require and take sufficient security for the due performance of the same."

Hawkins, in Easter Term last, obtained a rule nisi accordingly.

Lush, Q. C., and *Hance*, now showed cause.—The 85th section is directory only: as to some of its provisions it has already been so held in Nowell *v.* The Mayor, &c., of Worcester, 9 Exch. 457,† and Cunningham *v.* The Local Board of Health of Wolverhampton, 7 Ellis & B. 107 (E. C. L. R. vol. 90). The section requires, amongst other things, that the contract shall specify "the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed." It may not be possible in many cases to ascertain all these particulars beforehand: and, is it to be said that any failure in this respect renders the contract void? It may be, that, as between the members of the board and their constituents, the rate-payers, these are conditions which the former are bound to comply with; but they cannot be conditions precedent to the right of a party who has done work for them to sue for the price. There are no negative words: all is affirmative and directory. There are many cases of corporations and joint stock companies where matters which quoad the corporation itself are requisite to the validity of the contract, and do not disqualify the party contracting with them to enforce its performance by action. Such are the cases of the The Copper-Miners' Company *v.* Fox, 16 Q. B. 229 (E. C. L. R. vol. 71), Henderson *v.* The Australian Royal Mail Steam Navigation Company, 5 Ellis & B. 409 (E. C. R. R. vol. 85), Reuter *v.* The Electric Telegraph Company,
*582] 6 *Ellis & B. 341 (E. C. L. R. vol. 88), and Bill *v.* The Darenth Valley Railway Company, 1 Hurlst. & N. 305.† [WILLIAMS, J.—All these cases proceed upon the ground stated in Church *v* The Imperial Gas-Light Company, 6 Ad. & E. 841 (E. C. L. R. vol. 33), 3 N. & P. 35, viz., that they are corporations established for trading purposes.] It is submitted that this being a contract relating to matters within the scope of the duty of the local board, and there being no prohibitory words in the 85th section of the statute, the absence of the formality of the seal will not vitiate the contract.

Field (with whom was *Hawkins*), in support of the rule.—The plaintiffs seek by this action to charge the local board of health of the Worthing district in their quasi corporate capacity. It is necessary to see what are the powers with which the body is clothed, in order to arrive at the proper construction of the 85th section. They are trustees appointed for sanitary purposes, with limited powers to execute certain works. [COCKBURN, C. J., in strong terms expressed his reprehension of the turpitude of the defence.] The objection is one which the board

are bound to take. They can only pledge the credit of the rates in respect of contracts entered into by them in the manner and under the conditions prescribed by the act. The 85th section enacts in plain and unambiguous terms, that, "every such contract," that is, every contract which they are thereby empowered to enter into, "*shall* be in writing, and sealed with the seal of the local board by whom the same is entered into." It is impossible to get over that. [The learned counsel was stopped by the court.]

COCKBURN, C. J.—This rule must be made absolute. I very much regret that we are compelled to come to that conclusion; but I see no alternative. It is sought to make the rates for the district liable upon this *contract, by means of an action against the clerk to the [*583 local board. Now, the power given to the board to make contracts so as to bind the rates is the creature of the act of parliament; and that, by the very same clause which gives the board power to enter into contracts, amongst other things, expressly enacts that "every such contract, whereof the value or amount shall exceed 10*l.*, shall be in writing, and (in the case of a non-corporate district) *sealed with the seal of the local board by whom the same is entered into*, and signed by five or more members thereof, and (in the case of a corporate district) sealed with the common seal." I think the local board had no power to contract so as to bind the rates, unless they did so in the manner pointed out by the statute.

WILLIAMS, J.—I am of the same opinion. I do not see how we can, consistently with the ordinary rules by which statutes are construed, hold this part of the 85th section to be directory. It is not like the case of a thing which is to be done by the board, where those dealing with them have no means of knowing whether or not it has been done in the manner required by the act. Here, however, is a public act which requires that all contracts to be entered into by the local board shall be entered into in a particular way, viz. "in writing, and sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof." The plaintiff, therefore, must have been well aware that the board had no power to contract so as to bind the rates, except in the manner pointed out by the act.

WILLES, J.—I am of the same opinion. This case has been argued as if the 85th section of the act had been a controlling section, and as if all the terms in *which matters therein mentioned are required [*584 to be done were directory only. But it is that section which alone confers upon the local board the power of entering into contracts; and they must exercise that power in the terms in which it is by the act conferred upon them. I regret to be obliged to come to this conclusion; the more especially as this is not the first instance of fraud and oppression occasioned by this state of the law, within my own observation. Rule absolute.

WHEELER v. GRAY. *May* 24.

A landlord is justified, under the 83d section of the Metropolitan Building Act, 18 & 19 Vict. c. 122, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and other premises belonging to him, without giving the notice required by s. 85,—such tenant not being an "owner" within the interpretation clause, s. 3: and it is no objection that he has neglected to give the notice to the district surveyor required by s. 38.

Semble, that the landlord would (if necessary), under such circumstances, be a "person" entitled to notice of action under s. 108.

THIS was an action for a trespass in breaking and entering certain premises in the occupation of the plaintiff, a coffee-house keeper, in Gray's Place, King's Road.

The defendant pleaded not guilty "by statute," the statute referred to in the margin of the plea being the Metropolitan Building Act, 18 & 19 Vict. c. 122, ss. 3, 82, 83, 85, and 108; and also leave and license.

The cause was tried before Cockburn, C. J., at the sittings at Westminster after last Michaelmas Term. The facts which appeared in evidence were as follows: The defendant was the owner of the house in Gray's Place, which was in the occupation of the plaintiff as tenant from year to year under him. The defendant was also the owner of the adjoining house. The party-wall between the two houses being in a state of
*585] dilapidation, the defendant, without the permission of the *tenant, and without giving any notice to the district surveyor under the 38th section of the act,(a) or to the tenant, by one Lemon, a builder employed by him for that purpose, entered the house in the plaintiff's occupation, and pulled down and rebuilt the wall. There was conflicting evidence as to the state of the wall, the plaintiff's witnesses stating, on the one hand, that a slight repair would have sufficed, the defendant's witnesses, on the other hand, stating that the wall was in such a ruinous state as to render it necessary entirely to rebuild it.

On the part of the defendant it was submitted, that, inasmuch as he was acting or intending to act, under the provisions of the statute, he was entitled to a notice of action under s. 108;(b) and, further, that he

(a) Which enacts, that "two days before any building or any work to, in, or upon any building, is commenced," &c., "it shall be the duty of the builder engaged in building or rebuilding such building, or in executing such work, &c., to give to the district surveyor notice in writing stating the situation, area, and height, and intended use of the building or buildings about to be commenced, or to, in, or upon which any work is to be done, and the number of such buildings if more than one, and also the particulars of any such proposed work, and stating also his own name and address," &c.

In this case, the premises were situate in *two* districts and notice had been given to the surveyor of one of them only.

(b) Which enacts that "no writ or process shall be sued out against any district surveyor *or other person* for anything done or intended to be done under the provisions of this act, until the expiration of one month next after notice in writing has been delivered to him, or left at his office or usual place of abode, stating the cause of action and the name and place of abode of any such action, the plaintiff shall not be permitted to go into evidence of any cause of action the intended plaintiff, and of his attorney or agent in the cause; and, upon the trial of which is not stated in such last-mentioned notice; and, unless such notice is proved, the jury shall find for the defendant; and every such action shall be brought or commenced within six months next after the accrual of the cause of action, and not afterwards, and shall be laid and tried in the county or place where the cause of action occurred, and not elsewhere; and the defendant shall be at liberty to plead the general issue, and give this act and all special matter in evidence thereunder."

*was justified in what he did, by the 83d section,(*a*) and his lordship was asked to nonsuit the plaintiff. [*586

For the plaintiff it was insisted that the defendant was not entitled to a notice of action, because he had not given the requisite notices (*b*) to bring himself within the protection of the 108th section.

His lordship left it to the jury to say,—first, whether the wall in question was so far defective or out of repair as to make it necessary or desirable to pull it down,—*secondly, whether the defendant entered by the license of the plaintiff,—thirdly, what damages [*587 they thought the plaintiff entitled to for the inconvenience he had been put to.

The jury answered the first question in the affirmative and the second in the negative: and they assessed the damages at 5*l*.

The plaintiff's counsel thereupon asked his lordship to certify for costs, but he declined to decide as to the application then: and he reserved leave to the defendant to move to enter a nonsuit or a verdict for him, if the court should be of opinion that he was entitled to a notice of action, or justified in what he did.

Parry, Serjt., in Hilary Term last, moved pursuant to the leave. [COCKBURN, C. J.—The doubt I felt at the trial, was, whether a landlord who had leased premises could justify entering and pulling down a party-wall without the assent of the tenant.] The plaintiff was not in under any lease. [COCKBURN, C. J.—The defendant had parted with the possession and the right to the possession for a year or for six months, whichever it was. I doubted, and still doubt, whether he could enter in the way he did, unless he could justify himself under the building-act.] The defendant was clearly justified by the 83d section in entering to pull down and rebuild the party-wall; and the plaintiff was not a person entitled to notice under s. 85, inasmuch as he does not come within the definition of "owner," given in the interpretation clause, s. 3, which is, that "*owner* shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will." [WILLIAMS, J.—Was the party-wall proved to be in a *dangerous [*588 state?] Not in terms: but that would seem to be involved in the finding that it was so far defective or out of repair as to make it *necessary* to pull it down.

A rule nisi having been granted,

Gibbons now showed cause.—The first question is, whether a landlord

(*a*) Which enacts that "the building owner shall have the following rights in relation to party structures, that is to say," amongst others, "(1.) A right to make good or repair any party structure that is defective or out of repair. (2.) A right to pull down and rebuild any party structure that is so far defective or out of repair as to make it *necessary* or *desirable* to pull down the same."

(*b*) Under the 38th and 85th sections,—the latter of which enacts that "the following rules shall be observed with respect to the exercise by building owners and adjoining owners of their respective rights:" amongst others,—"(1.) No building owner shall, except with the consent of the adjoining owner, or in cases where any party structure is dangerous, in which cases the provisions hereby made as to dangerous structures shall apply, exercise any right hereby given in respect of any party structure, unless he has given at the least three months' previous notice, *to the adjoining owner*, by delivering the same to him personally, or by sending it by post in a registered letter addressed to such owner at his last known place of abode. (2.) The notice so given shall be in writing or printed, and shall state the nature of the proposed work, and the time at which such work is proposed to be commenced."

has a right at common law to enter upon his tenant for the purpose of doing repairs; the second, whether the defendant had any justification in this case under the Metropolitan Building Act, 18 & 19 Vict. c. 122, or whether he was entitled to a notice of action under the 108th section of that act. [*Parry*, Serjt., conceded, that, unless justified under the statute, the defendant was not justified at all, and intimated that he should rely upon the 83d section, which defines the rights of the building owner.] It is clear that the landlord would be guilty of a trespass in entering to repair, without the permission of the tenant: Barker *v.* Barker, 3 Car. & P. 557 (E. C. L. R. vol. 14); Neale *v.* Wyllie, 3 B. & C. 533 (E. C. L. R. vol. 10), 5 D. & R. 442 (E. C. L. R. vol. 16). The 82d section enacts, that, "in the construction of the following provisions relating to party structures, such one of the owners of the premises separated by or adjoining to any party structure as is desirous of executing any work in respect to such party structure shall be called the building owner, and the owner of the other premises shall be called the adjoining owner." The 83d section gives the building owner "a right to pull down and rebuild any party structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same." But the 85th section expressly enacts that "no building owner shall, except with the consent of the adjoining owner, or, in cases where any party structure is dangerous, exercise any right thereby given in
*589] respect of any party structure, unless he has *given at the least three months' previous notice to the adjoining owner," &c. And s. 111 enacts that "nothing herein contained shall vary or affect the rights or liabilities as between landlord and tenant under any contract between them." The 38th requires two days' notice to be given by the builder to the district surveyor; the 39th imposes upon the district surveyor the duty of seeing that the provisions of the act are complied with; and the 41st section imposes upon the builder a penalty of 20*l.* for neglecting to give such notice. As building owner, therefore, the defendant could at the most only have a qualified right, to enter and repair or rebuild, provided he gave the notices required by the 38th and 85th sections. Then, was he entitled to a notice of action under s. 108? The words of that section are, "No writ or process shall be sued out against any district surveyor *or other person*, for anything done or intended to be done under the provisions of this act, until," &c. Now, the rule laid down in Sandiman *v.* Breach, 7 B. & C. 96, 100 (E. C. L. R. vol. 14), 9 D. & R. 796 (E. C. L. R. vol. 22), is, that, where general words in an act of parliament follow particular words, they are to be construed to apply to persons or things ejusdem generis. Applying that rule here, the words "or other persons" must be held to mean persons acting under the district surveyor. Here, the evidence showed, that, so far from acting under the district surveyor, the defendant was proceeding altogether without his sanction. [BYLES, J.—The defendant evidently intended to do what he did under the provisions of the act. He was building owner, and he was owner of the adjoining premises. Was he not justified in entering the adjoining premises for the purpose for which he entered?] Possibly he might have been if he proceeded under the act, by giving notice to the district surveyor. [WILLIAMS,
*590] J.—Is he the less entitled to notice of action because he *proceeds wrongfully? If all were regular, the notice would not be

needed.] A man cannot be said to be acting under the act, when he is found to be expressly evading the act. The statute applies only to works done under the inspection and superintendence of the district surveyor.

Parry, Serjt., in support of the rule.—The defendant was a mere tenant from year to year, and therefore clearly not such an owner as is entitled to notice under s. 85. The person who is required by s. 38 to give notice to the district surveyor is *the builder*, not the *owner:* and by the interpretation clause (s. 3), it is provided that "*builder* shall apply to and include the master builder or other person employed to execute or who actually executes any work upon any building." Assuming, however, that the defendant was the person who ought to have given notice to the district surveyor, he may be liable to a penalty for the omission, but that cannot affect his rights as against the plaintiff. Then, as to the necessity for a notice of action,—it is said that the 108th section applies only to persons acting under or by the authority of district surveyors. It is manifest that that cannot be the true interpretation of the section: the words "or other person" are clearly referable to "owners" and "builders" as defined by s. 3. The act was not intended merely to put district surveyors in motion. The cases of Collins *v.* Poney, 9 East 322, and Pratt *v.* Hillman, 4 B. & C. 269 (E. C. L. R. vol. 10), 3 D. & R. 360 (E. C. L. R. vol. 16), which were decided upon the 100th section of the old building act, 14 G. 3, c. 78, show that this 108th section cannot have the limited meaning contended for on the other side. The defendant clearly intended to act within the statute;(*a*) and the jury have virtually *found that he did so. It would be putting far too narrow a construction upon the 108th section to hold it to be limited to district surveyors. [WILLIAMS, J.—Who are the "other persons" who are supposed to be ejusdem generis with district surveyors? *Gibbons.*—Any persons who are acting under their sanction or direction. COCKBURN, C. J., referred to s. 73, which speaks of "commissioners" who act in the performance of analogous duties with reference to dangerous structures.] [*591

COCKBURN, C. J.—I am of opinion that the rule must be made absolute to enter a nonsuit in this case, on the ground that it falls within the 108th section of the building act, 18 & 19 Vict. c. 122, and consequently that the defendant was entitled to a notice of action, and further that the action should have been brought within the time prescribed by that section for the commencement of actions for anything done or intended to be done in pursuance of the act. Independently also of that section, I am of opinion that the defendant was perfectly justified in what he did. The facts were these:—The plaintiff was tenant of certain premises of which the defendant was the owner, and which premises were separated by a party-wall from other premises adjoining, also belonging to the defendant. The condition of the party-wall becoming such as to render it necessary that it should be rebuilt, the defendant, against the will of the plaintiff, entered upon his premises for that purpose; and the question is whether he was justified in so doing. Now, the defendant was the owner of both the premises, and therefore, as my Brother *Parry* says, he was "owner" of the premises

(*a*) See Read *v.* Coker, 13 C. B. 850 (E. C. L. R. vol. 76).

occupied by the plaintiff, and "building owner" with reference to the premises not occupied by the plaintiff. He therefore was entitled, when
*592] the *party-wall became decayed, upon giving notice, if notice was necessary, to go upon the premises and do the repairs. The 85th section requires notice to be given to the owner of the adjoining premises. If, therefore, the adjoining premises had been the property of any other than the defendant himself, it would have been necessary for the defendant to give him notice: and, if he had done so, then, as the interpretation clause of the act provides that "owner" shall mean "every person in possession or receipt of the whole or any part of the rents or profits of any lands or tenements, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will," it is clear that such notice would have satisfied the exigency of the 83d section. But it happened here that there was no adjoining owner other than the defendant himself. Now, it was not necessary that the defendant should give notice to himself; therefore, the necessity for such notice could not arise here. Notice being only required to be given to the "owner" described in the interpretation clause, and there being no person other than the defendant who filled that character, it follows that the defendant was entitled as owner to enter the adjoining house for the purpose of pulling down and rebuilding the party-wall, the state of which was such, as the jury have found, as to render it desirable and necessary so to do. In such a view of the case, there is no necessity to resort to the 108th section of the act, and therefore it is perhaps better not to pronounce any decided opinion as to whether or not a "building owner" is included within the words of that section. The matter is open to much argument on both sides. It has been contended, on the one hand, that a large and liberal view of the statute should be taken in favour of persons who are acting
*593] for the benefit of the public; and that, *I must own, is the inclination of my opinion: but it is unnecessary to decide it, inasmuch as the defendant is clearly protected under s. 83.

WILLIAMS, J.—I also am of opinion that it is unnecessary to consider whether the defendant is a "person" within the meaning of the 108th section, inasmuch as he need not have recourse to that section, because I think he was justified in entering for the purpose of pulling down and rebuilding the party-wall under s. 83. If, as I at first thought, the defendant relied upon being the "building owner" of the premises occupied by the plaintiff, I should have felt some difficulty in saying that he was justified in what he did. But it appears that he was the "building owner" of the adjoining house, of which as well as of that in the occupation of the plaintiff he was landlord: and he relies upon the 2d article of s. 83, by which a right is given to the building owner,—who by s. 82 is defined to be "such one of the owners of the premises separated by or adjoining to any party structure as is desirous of executing any work in respect to such party structure,"—to "pull down and rebuild any party structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same." The jury in this case have found that it was necessary and desirable that the party-wall in question should be pulled down and rebuilt; therefore, the defendant had a clear right to resort to the powers given him by that section. But it is said that there are two sections which require some-

thing to be done by the party before he can proceed to exercise the right given to him by s. 83, viz., the 38th, which requires a two days' notice to be given to the district surveyor, and the 85th section, which requires a three months' notice to be given to the "adjoining owner." Now, as to the latter, it *appears that the occupier of the adjoining premises was only a tenant from year to year. He, therefore, is not owner within the definition of owner given in s. 3, and consequently was not entitled to notice. The defendant was himself the owner, and the person entitled to the rents and profits of the premises. The objection, therefore, of the want of a notice under s. 85 falls to the ground: and the only remaining question is, whether it was necessary that the defendant should have given notice to the district surveyor. There is much in the argument that the duty of giving notice to the district surveyor is cast upon the *builder* only. But, assuming that the defendant is to be considered as a builder within the act, it seems to me that the omission to give that notice does not affect his rights as against the adjoining owner or occupier, though it may render him liable to a penalty for neglecting to conform to the requisition of the act. It therefore seems to me that this objection also fails. As to the observations which have been made as to the supposed hardship on the tenant, that he should be compelled to go on paying rent whilst by reason of the act of his landlord he derives no benefit from his occupation of the premises,—it is unnecessary to go into that. It may be, that, notwithstanding the tenant has no right to complain in this form of action, the exercise of the landlord's right under the statute might amount to an eviction, and so disentitle him to recover rent during the period occupied by the repairs. [*594

WILLES, J.—I also am of opinion that the rule must be absolute to enter a nonsuit. I say nothing as to the construction of the 108th section, because the first part of it applies only to the case of a thing done which was not lawful, but where the party doing it was acting bonâ fide under an impression that he was *pursuing the provisions of the act, and therefore he is protected sub modo,—unless a certain notice be given and the action be brought within a given time. Before coming to any conclusion upon that point, I should think it necessary to consider the decisions upon the 159th section of the Bankrupt Act, 12 & 13 Vict. c. 106, the words of which are much more general, and which have been held to apply only to officers who are bound to act in the performance of some duty, and not to assignees or persons who take upon themselves to act.(a) Contenting myself with merely intimating that, I found my opinion in the present case upon the defendant's being justified in doing what he did, under the 83d section of the act. Now, if the premises adjoining had belonged to any other person than the defendant, the defendant would have been a building owner within s. 82, for that section says that "such one of the owners of the premises separated by or adjoining to any party structure as is desirous of executing any work in respect to such party structure, shall be called the building owner." A "party structure" is by the interpretation clause (s. 3) defined thus,—"*Party structure* shall include party-walls, and also [*595

(a) See Carruthers v. Payne, 2 M. & P. 420 (E. C. L. R. vol. 17), 5 Bingh. 270 (E. C. L. R. vol. 15).

partitions, arches, floors, and other structures separating buildings, stories, or rooms which belong to different owners, or which are approached by distinct staircases or separate entrances." That is a remarkable definition. If, then, the ownership of the adjoining premises had been in another person, the defendant clearly would have been entitled, as building owner, under s. 83, the party structure being out of repair (as the jury have found this party-wall to have been), to enter for the purpose of repairing it. The 83d and subsequent sections define the rights of the building owner: and s. 86 enacts, that, *"whenever any building owner has become entitled, in pursuance of this act, to execute any work, it shall be lawful for him, his servants, agents, or workmen, at all usual times of working, to enter on any premises for the purpose of executing, and to execute such work, removing any furniture or doing any other thing that may be necessary, and, if such premises are closed, he or they may, accompanied by a constable or other officer of the peace, break open any doors in order to such entry: and any *owner* or *other person* that hinders or obstructs any workman employed for any of the purposes aforesaid, or wilfully damages or injures the said work, shall incur for every such offence a penalty not exceeding 10*l.*, to be recovered before a justice of the peace." Turning again to the interpretation clause, I find "owner" means "every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will." Such being the meaning of "owner," the words "other persons" must mean other persons generally, and within that category comes the present plaintiff. That being so, the question is, whether the fact of ownership makes any difference, or whether the defendant does not fill the two characters of building owner and adjoining owner. The notice required by the 85th section is to be given, not to the occupier, but to the adjoining *owner*. There is nothing in the act which requires any notice to be given to the *tenant*. There being, therefore, no adjoining owner here to whom a notice could be given, no notice was or could be necessary, according to the well-known rule of construction, that, where an act of parliament enacts that something shall be done in a certain way, and subject to a condition, giving the matter in detail, and the condition cannot in the *particular case be performed, it need not be. One familiar illustration of that is, the case of an appeal being given subject to certain recognisances being entered into by the appellant, which has been held to apply to corporations, though, as they cannot enter into recognisances, they cannot perform the condition. They are bound only to do what by their peculiar constitution they can do. In such case the particular intent must give way to the general intent of the statute. So, here, the statute deals with party structures between different properties. The expressions it uses must clearly be construed so as to apply to party structures notwithstanding the premises on both sides belong to the same owner, just as if they belonged to different owners. I therefore think there is nothing absurd in holding that the defendant may fill both characters; and it seems to me that he had a perfect justification under the 83d section for what he did. The rule must be made absolute.

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Byles, J.—I am of the same opinion. The reasons upon which the

judgment of the court is founded having been so fully given by my Lord and my learned Brothers, I do not think it necessary to add anything. Rule absolute for a nonsuit.

Affirmed on error to the Exchequer Chamber, 5 Jur. N. S. 916; 28 Law Journ. C. P. 200.

*BROWNE and Another *v.* SIR ROBERT PRICE, Baronet. [*598

June 25.

The defendant by deed of mortgage, reciting a loan of 12,500*l.* by the plaintiffs to the defendant upon the security of a demise of the defendant's life interest in certain property and a conveyance of a reversion in fee, and also by a policy for 13,000*l.* in the Norwich Union Life Assurance Office, payable within three months after the death of the defendant "in case he should leave issue male by his then present wife living at his death,"—the defendant covenanted that he would "from time to time during his natural life, and so long as the said sum of 12,500*l.*, or any part thereof, or any interest for the same, should remain due and owing on the said security, continue and keep on foot the benefit of the said recited policy of assurance, and pay or cause to be paid the yearly and other premiums, &c., and would not permit or suffer or do any act whereby the said policy might be forfeited or vacated," &c. The deed also contained a proviso, that, in case the defendant should neglect to pay the premiums, it should be lawful for the plaintiffs to pay the same, and to charge the payments so made upon the hereditaments thereby charged. The deed contained no covenant by the defendant to repay the plaintiffs the sums they might pay to keep the policy alive.

The defendant paid the interest and premiums regularly down to the year 1848, but since that time (there being then no possibility of his having any issue by his then wife) he had discontinued to pay the premiums. The annual premiums accruing up to the present time were placed to the credit of the office in an account kept by them, called their "Policy Premium Account," and regularly debited year by year by the office to the mortgage account of the defendant, according to the practice of the office,—but the defendant had no notice of this course of dealing.

The plaintiffs having brought an action against the defendant upon his covenant for payment of the premiums, the defendant pleaded payment of 1*s.* into court.

Upon a special case stating these facts,—Held, that, assuming the plaintiffs to have *paid* the premiums, they were not entitled to more than nominal damages.

But, *semble*, that the course of dealing stated did not amount to evidence that they had paid them.

THIS action came on for trial at the sittings at Westminster after last Hilary Term, when a verdict was entered for the plaintiffs, by consent, subject to the opinion of the court upon the following case:—

The first count of the declaration stated that the defendant by deed of mortgage,—reciting that the plaintiffs and Edmond Wodehouse and Edward Wenman Martin (now respectively deceased) had, upon his application and request, agreed to advance and lend him the sum of 12,500*l.* upon the terms that the repayment thereof, with interest for the same at the rate of 5*l.* per cent. per annum, but reducible as thereinafter mentioned, should be secured to them by a demise of the messuages, farms, lands, and hereditaments therein described for the term of ninety-nine years, if the defendant should so long live, and by a grant and conveyance of the remainder or reversion in fee of and in *the same hereditaments limited to him by a certain indenture [*599 of settlement therein mentioned, and also by the policy of assurance hereinafter mentioned, and also by the trusts, powers, provisoes, covenants, and agreements thereinafter contained; and also reciting,

that, by a policy or instrument of assurance, under the hands and seals of three of the directors of the Norwich Union Life Assurance Society, and numbered 22,109, and bearing date the 31st of May, 1841, the sum of 13,000*l.* had been assured to the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin, payable within three months after satisfactory proof of the death of the defendant, in case he should leave issue male by his then present wife living at his death, if the annual premium or sum of 260*l.* therein mentioned should be duly paid at or within the time therein appointed, and upon other the terms and conditions in the said policy expressed,—the defendant covenanted with the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin, that he would from time to time during his natural life, and so long as the said sum of 12,500*l.*, or any part thereof, or any interest for the same, should remain due and owing on the said security, *continue and keep on foot the benefit of the recited policy of assurance, and pay or cause to be paid the yearly and other premiums*, or any extra premium or sum which ought to be paid, *for the purpose of continuing and keeping on foot the benefit thereof*, two days at least in every year before the same should become due, and would deliver the receipt or receipts for the same respectively, within five days after payment thereof, to them the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin, and would not permit or suffer or do any act whereby the said policy might be forfeited or vacated by reason or means of his *600] neglect, omission, commission, or default, nor do *or suffer or cause to be done any act, deed, matter, or thing whatsoever, whereby or in consequence of which any increased rate of premium should become payable upon or in respect of the said policy, or whereby or in consequence whereof the same should be released or discharged, or the benefit thereof cease, determine, or be lessened, or the right of the said plaintiffs and Edmond Wodehouse and Edward Wenman Martin to receive the said sum of 13,000*l.* thereby secured be in any way affected, impeached, interrupted, or encumbered; And also, that, by another deed of mortgage,—reciting that the defendant had occasion for, and, upon his application and request, the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin had agreed to advance and lend him, the further sum of 7500*l.*, upon the terms that the repayment thereof, with interest for the same at the rate of 5*l.* per cent. per annum, but reducible as thereinafter mentioned, should be secured to them by a further charge upon the hereditaments comprised in the deed in the first count mentioned, and also by the policy of assurance hereinafter mentioned; and reciting, that, by a policy or instrument of assurance, under the hands and seals of three of the directors of the Norwich Union Life Assurance Society, No. 22,401, bearing date the 7th of February, 1842, the sum of 8000*l.* had been assured to the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin, payable within three months after satisfactory proof of the death of the defendant, in case he should leave issue male by his then present wife living at his death, if the annual premium or sum of 160*l.* therein mentioned should be duly paid at or within the time therein appointed, and upon other the terms and conditions in the said policy expressed,—the defendant covenanted with the plaintiffs and the said Edmond Wodehouse

and Edward Wenman Martin that *he would from time to time during his natural life, and so long as the said sum of 7500*l.*, or [*601 any part thereof, or any interest for the same, should remain due and owing upon the now reciting security, *continue and keep on foot the benefit of the last-mentioned policy of assurance, and pay or cause to be paid the yearly and other premiums* or any extra premium or sum which ought to be paid *for the purpose of continuing and keeping on foot the benefit thereof*, two days at least in every year before the same should become due, and should and would deliver the receipt or receipts for the same respectively, within five days after payment thereof, to the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin, and would not permit or suffer the said policy to be forfeited or vacated by reason or means of his neglect, omission, commission, or default, nor do or suffer, or cause to be done, any act, deed, matter, or thing whatsoever whereby or in consequence of which any increased rate of premium should become payable upon or in respect of the said policy, or whereby or in consequence whereof the same should be released or discharged, or the benefit thereof cease or determine or be lessened, or the right of the plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin to receive the said sum of 8000*l.* thereby secured be in any way affected, impeached, interrupted, or encumbered: Averment, that the said principal sums of 12,500*l.* and 7500*l.* were still due and owing upon and by virtue of the said several deeds, and that the defendant did not continue and keep on foot the benefit of the said several policies, or either of them, or pay or cause to be paid the yearly premiums which ought to be paid for the purpose of continuing and keeping on foot the benefit thereof, but, on the contrary, neglected and refused to pay the said premiums, for divers, to wit, eight years next before this *suit, contrary to his covenant in that behalf; and that, by reason thereof, the same had severally been kept on foot by the [*602 plaintiffs and the said Edmond Wodehouse and Edward Wenman Martin in their lifetime, and by the plaintiffs since their decease: and the plaintiffs claimed, by way of damages for the amount of the said annual premiums, and interest thereon, 30,000*l.*

The defendant, by J. L. T., his attorney, brought into court the sum of 1*s.*, and said the same was enough to satisfy the claim of the plaintiffs in respect of the matter therein pleaded to.

The plaintiffs said that the sum was not enough to satisfy the claim of the plaintiffs in respect of the matter pleaded to by the defendant. Issue thereon.

The plaintiffs are, and were at the respective dates of the mortgages and policies in the declaration mentioned, trustees of the Norwich Union Life Assurance Society, and, as such, were parties to the said deeds and policies, although not so described in either. The full premiums payable in respect of the said two policies were paid by the defendant up to and inclusive of the year 1845. In that year, the directors of the said society consented, upon the application of the defendant, to reduce the future premiums by one half. The annual premiums on the policies so reduced were paid by the defendant, either to the London agent of the society or to the secretary at Norwich, up to and inclusive of the year 1848. Since that time, no payment has been made on account thereof by the defendant, but the annual premiums accruing up to the date of

this action have been placed to the credit of the said society in an account kept by them, called their policy premium account, and regularly debited year by year by the said society to the mortgage account of the defendant, according to the practice in their office. When a *603] policy has become lapsed, or has been surrendered or *cancelled, the practice of the said society is, to make a note to that effect in the margin of the policy register-book; and, from that time, no entry or debit is made of the annual premiums. There is no evidence, save as appears herein, that the defendant had any notice or knowledge of the above-mentioned practice, or of the fact of its being acted upon. No such note has been made with reference to either of the policies in question; but, on the contrary, the annual premiums have been regularly credited and debited in manner hereinbefore mentioned; and, in the declaration of a bonus for the years 1851 and 1856, the said policies were treated in the books of the company as existing contracts, and proportionate additions made to each policy in the same manner as for the years 1841 and 1846. There is no evidence that the defendant knew that the policies were so treated.

The material provisions in the mortgage-deed (a copy of which accompanied and was to form part of the case) were as follows:—

"And the said Sir Robert Price doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said Horatio, Lord Walpole, Edmund Wodehouse, Edward Wenman Martin, and William John Utten Browne, their executors, administrators, and assigns, that he the said Sir Robert Price, his executors, administrators, or assigns, some or one of them, shall and will well and truly pay or cause to be paid unto the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, or the survivors or survivor of them, their or his executors, administrators, or assigns, the said principal sum of 12,500*l.* and interest for the same at the rate of 5*l.* for 100*l.* for a year, on," &c.

"And further, that the said recited policy of assurance is a good, valid, *604] and subsisting policy for the full *amount of the said sum of 13,000*l.* thereby secured, and that the said Dame Mary Ann Elizabeth Price, his wife, is now in the forty-fourth year of her age, and that she is not now enceinte; and that he the said Sir Robert Price shall and will from time to time during his natural life, and so long as the said sum of 12,500*l.*, or any part thereof, or any interest for the same, shall remain due and owing on this security, continue and keep on foot the benefit of the said recited policy of assurance, and pay or cause to be paid the yearly and other premiums, or any extra premium or sum which are or ought to be paid for the purpose of continuing and keeping on foot the benefit thereof, two days at least in every year before the same shall become due, and shall and will deliver the receipt or receipts for the same respectively within five days after payment thereof to them the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, their executors, administrators, or assigns, and shall not nor will permit or suffer or do any act whereby the said policy may be forfeited or vacated by reason or means of his neglect, omission, commission, or default, nor do or suffer, or cause to be done, any act, deed, matter, or thing whatsoever whereby or in consequence

of which any increased rate of premium shall become payable upon or in respect of the said policy, or whereby or in consequence of which the same policy shall or may be released or discharged, or the benefit thereof cease, determine, or be lessened, or the right of the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, their executors, administrators, or assigns, to receive the said sum of 13,000*l.* thereby secured, be in any way affected, impeached, interrupted, or encumbered," &c.

"And also that, in case the said Sir Robert Price shall neglect or refuse to pay any such premiums as *aforesaid on the said recited policy, or to deliver the receipt or receipts for the same as aforesaid, or shall cause or suffer the said policy to be forfeited or vacated contrary to his covenant hereinbefore contained, it shall be lawful for the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, and the survivors and survivor of them, their or his executors, administrators, or assigns, to pay such premium as aforesaid, or, as the case may require, to effect any other policy or policies on the life of the said Sir Robert Price for any sum or sums of money not exceeding the said sum of 13,000*l.*, and to continue and keep on foot the benefit of the said policy or policies respectively; and that all and every the sum and sums of money which shall be so paid by the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, or the survivors or survivor of them, their or his executors, administrators, or assigns, for or in respect of the said recited policy, or of any such renewed policy or policies, or for or on account of such extra or additional premium or premiums as aforesaid, with interest for the same at the rate aforesaid, shall be and the same are hereby charged upon the said hereditaments hereby respectively demised and granted and conveyed, or intended so to be, and upon every such policy as aforesaid, and shall be raisable and payable and paid out of any moneys to arise or be received under or by virtue of these presents, or any of the powers or trusts hereinafter contained; and that the said hereditaments and premises, or the said policy or policies, shall not be redeemed or redeemable at law or in equity until payment to the said Horatio, Lord Walpole, E. Wodehouse, E. W. Martin, and W. J. U. Browne, or the survivors or survivor of them, their or his executors, administrators, or assigns, not only of the said sum of 12,500*l.* and the interest thereof, but also of all such *sum or sums of money as they or he shall pay in respect of any such assurance or premiums as aforesaid, with lawful interest for the same." [*605 [*606

The whole of the mortgage-money, and a large arrear of interest, still remain due.

The following applications were made for interest and premiums, and the following answers returned:—

Sir Samuel Bignold to Sir Robert Price,—

"Norwich, January 26th, 1850.

"My dear Sir Robert,—I am afraid you must be ill, or you would not have passed the time of payment of your interest without a word of remark. There is now, or in a few days there will be, a year due, besides an arrear of the insurance on the commuted scale. The directors remarked the other day on this state of things, and said some steps

must be taken. I do not think there is any time to be lost, if you wish to prevent any interference of a receiver. Pray let me hear from you.

"Yours faithfully,
"SAMUEL BIGNOLD."

Sir Samuel Bignold to Sir Robert Price,—

"Norwich, May 17th, 1850.

"Dear Sir Robert,—The state of your account is so greatly out of order, the interest due in February last being still unpaid, that the directors will be certain to take some decisive steps, which I fear may be annoying to you: but I am altogether unable to stop it, except by the announcement that I have received 406*l.* 11*s.* The insurance premium on the reduced scale is long overdue.

"Yours truly,
"SAMUEL BIGNOLD."

Sir Robert Price to Sir Samuel Bignold,—

"May 25. Saturday evening.

*607] "My Dear Sir,—I am much obliged by the friendly *warning you have given me. It is too true that my difficulties are not yet over; for the depression in that unfortunate iron trade is greater than ever, which makes it next to an impossibility for me to meet my engagements with that punctuality which I am well aware ought to prevail. I trust, however, I shall be able to make a remittance early in the next month; and, in the meantime, I hope for the continuance of that indulgence which I have before received from the directors. I write too late for the post: but I shall put it into the office, that it may go by the early mail on Monday. I should have written sooner, in reply to your obliging letter, but I was in hopes by this time to have been able to have sent accompanying draft. Yours very truly,

"ROBERT PRICE."

Sir Robert Price to Sir Samuel Bignold,—

"August 1, 1850.

"My Dear Sir,—I send you 300*l.* on account; and I trust in the course of the week to forward the 106*l.* 11*s.* I am aware that even then I shall be indebted to the indulgence of your board; but indeed I believe, as it is the kindest, so it is the best course for them to pursue at the present time. Yours very truly,

"ROBERT PRICE."

Lady Price has never had any issue, and has never been enceinte. She is now in the sixty-first year of her age.

In the year 1849, the defendant stated to the directors of the Norwich Union Office, that, in his opinion, there was no possibility of his wife, who was then in the fifty-third year of her age, having any issue, and requested them to forego the payment of any further premiums; *608] but the directors refused so to do, and also *refused to make any further reduction in the rate, and insisted on the policies being maintained at the rate settled in 1845. The defendant died on the 5th of November, 1857; but this fact is not to prejudice the proceedings in the action.

The question for the opinion of the court is, whether the plaintiffs are, under the circumstances, entitled to recover in this action more than nominal damages: if not, the verdict to be entered for the defend-

ant; if they are, the verdict for the plaintiffs is to stand, for such sum as the court shall think fit. The court is to have the same power of drawing inferences as a jury.

Lush, Q. C. (with whom was *Cleasby*), for the plaintiffs.(*a*)—The true measure of damages in this case is, the amount of the premiums stipulated for by the policy. The position of the plaintiffs is this,—they have kept alive the policy against themselves, so that, if the event insured against happened, they would have been called upon to pay the 13,000*l*. The only measure of damages must be what the parties themselves have agreed for. If the policy had been effected in any other office, and the plaintiffs had paid the premiums, the measure of damages clearly would have been the amount they had paid. [WILLIAMS, J.—Suppose there were two covenants,—one to pay the premiums,—the other that the covenantees might pay them on the default of the covenantor, and recover the amount from him: if the covenantees entitled themselves to claim upon the second covenant, could they recover more than nominal damages upon the first?] That would be like the case of Warburg *v.* Tucker, 5 Ellis & B. 384 (E. C. L. R. vol. 85), where the Court *of Queen's Bench held that the plaintiff was entitled to recover in respect of both covenants. [WILLIAMS, J.—The [*609 ground of the decision there was, that the bankruptcy and certificate of the covenantor did not discharge him from the plaintiff's claim for a breach of either covenant,—the sum not being a debt payable upon a contingency within the 177th section of the bankrupt act, 12 & 13 Vict. c. 106, nor a liability to pay money upon a contingency within s. 178. In Young *v.* Winter, 16 C. B. 401 (E. C. L. R. vol. 81), where the covenants were similar, this court held that the defendant was discharged, by virtue of ss. 178, 200, from liability for the breach of the first covenant, but not as to the second. In the course of the argument in the latter case, Maule, J., observes,—"Suppose the second covenant had not been there at all, the non-payment of the premiums by the bankrupts would have been a breach of the first covenant. What damages would the plaintiff have been entitled to in that case?" According to the report in 16 C. B. 417, the answer given by the learned counsel was, "Nominal damages would be all he could recover on the first breach." In the report in the 24 Law Journ. C. P. 217, the answer is thus stated,—"Only the sum actually paid by the plaintiff to keep the policies on foot."] As reported in the last-mentioned book, the counsel is made to say precisely what the contention here is, viz., that there was a fixed and ascertained amount of damages. In Warburg *v.* Tucker, the Court of Queen's Bench held that neither claim was provable. The Exchequer Chamber gave no judgment as to the second covenant, and the record now stands with a judgment on the first (which is like the covenant here), with damages to the full amount of the premiums.(*b*) [CROWDER, J.—The amount of damages was not before the court of error. WILLIAMS, J.—They were assessed by consent.] All we know of the case is, that *the plaintiff's claim was not confined to nominal damages. [WILLIAMS, J.—If it is to be taken that the [*610

(*a*) The point marked for argument on the part of the plaintiffs was as follows:—

"That the proper measure of damages is the amount of the premiums in arrear, and interest thereon at 5*l*. per cent. per annum."

(*b*) See Warburg *v.* Tucker, 28 Law J., Q. B. 56.

defendant was liable for the amount of the premiums paid, the decision that it was not a contingent liability to pay money was wrong. The case, however, is no authority at all. We do not know, neither did the Exchequer Chamber, what the circumstances were.] The plaintiffs, it is submitted, are entitled to a full indemnity for having kept the policy alive. [CROWDER, J.—How do they keep the policy alive?] By doing that which is equivalent to payment of the premiums. They credit the premium account and debit themselves. It is the same as if they had lent the money to Sir Robert Price with one hand, and received it from him with the other. The damages, therefore, which they have sustained, are, the aggregate of the premiums which he had agreed to pay for the risk which they have undertaken. [CROWDER, J.—What difficulty was there in inserting a covenant to repay?] This, it is submitted, is a covenant to repay. Sir Robert Price covenants to pay the annual premiums; and the plaintiffs have a remedy, in case of default, by charging the payments to the land. If the policy takes effect, the land is of no value.

Manisty, Q. C. (with whom was *Russell*), contrà.(*a*)—The covenant is, to continue and keep on foot the benefit of the policies, and pay or cause to be paid the yearly or other premiums for that purpose; and the breach assigned is, that the defendant did not continue and keep on foot
*611] the benefit of the policies, or pay or *cause to be paid the premiums,—by reason whereof they had been kept on foot by the plaintiffs. Now, what damages have the plaintiffs sustained by keeping the policies on foot? They have *paid* nothing; they have merely made certain entries in a ledger. What is the value of the risk which the plaintiffs have incurred in consequence of the defendant's failure to keep the policies on foot? Absolutely none. By the terms of the policy, the company were to pay 13,000*l.* in the event of Sir Robert Price dying and leaving a son by his then wife, whose age, as stated in the case, was fifty-three. If Lady Price had been eighty-three, it would have been all the same: the damages never would have been diminished by the diminution of the risk. The case which approaches nearest to this, is, The National Assurance and Investment Association *v.* Best, 2 Hurlst. & N. 605.† There, the plaintiffs lent the defendant 600*l.* on the security of an indenture whereby two policies of insurance were charged with the payment of the principal money and interest. The indenture contained a covenant by the defendant to pay the premiums of the policies. By their terms, the policies only remained in force provided the premiums were paid every year. The defendant paid the first year's premium only, and the plaintiffs sued him on his covenant for non-payment of the three subsequent years' premiums: and the court held that, as it did not appear that the plaintiffs had sustained any loss by the defendant's neglect to keep up the policies, the measure of damage was not the amount of the three years' premiums, but that the plaintiffs were entitled to nominal damages only. Pollock, C. B., in giving judgment, there says: "It is clear that the amount of the premiums is not the criterion of damage. The premiums not having been paid by the covenantors, if the covenantees had paid them in order to keep up the

(*a*) The point marked for argument on the part of the defendant, was,—
"That the plaintiffs are only entitled to nominal damages, and that, having paid 1*s.* into court, judgment ought to be given in his favour."

*policy, or, for their own security, had effected another policy, there might have been ground for substantial damages; but here [*612 there was nothing but the loss of the security; and it does not appear that any actual injury was sustained by the plaintiffs in consequence of that. The plaintiffs have not put us, nor did they put the jury, in a situation to estimate what damages they are entitled to, if the amount of the premiums does not furnish the criterion. As the court cannot substitute any other measure of damages, we think that on the first count the plaintiffs are entitled to nominal damages only." [WILLIAMS, J.—The difficulty I feel, is, that the plaintiffs have done nothing under the authority of the defendant: but, what they have done is pursuant to the provisions of the mortgage-deed. I think their only remedy is that which is pointed out by the deed. We must hear what Mr. *Lush* has to say upon this point.]

Lush.—The defendant covenants absolutely to keep alive the policies, and to pay the yearly premiums. It is as if he had covenanted to pay the plaintiffs a given sum every year so long as the mortgage-debt should remain unpaid, in which case it is clear that the plaintiffs would be entitled to recover what the defendant had agreed to pay. [WILLES, J.—The covenant is, for payment of the premiums to the Norwich Union Life Assurance Society, not to the plaintiffs.] The plaintiffs are the representatives of the Norwich Union Life Assurance Society. The case so finds. Although technically called damages, the sum the plaintiffs are entitled to recover in the action would be the amount of the premiums. [WILLIAMS, J.—According to your argument, the plaintiffs might recover the amount of the premiums in this action, even though the mortgage might be an ample security.] That no doubt is so. But the stipulation *that the plaintiffs should be at liberty to add to [*613 the mortgage-debt the amount of any premiums they might pay for the purpose of keeping the policies on foot, cannot affect the construction of the defendant's absolute covenant to pay the premiums himself for that purpose. The same argument would equally apply to the covenant for payment of the interest on the sums advanced. [CROWDER, J.—All difficulty would have been avoided if the deed had contained a covenant on the part of the defendant to repay any premiums which the plaintiffs might be called upon to pay.] The question is, whether such a covenant was necessary. The covenant of the defendant to pay the premiums gives the plaintiffs, without more, authority to keep up the policies if the defendant omits to do so. In the case of a mortgage of a leasehold house, with an assignment of a fire policy, and a covenant by the mortgagor to keep up the policy, the mortgagee would be entitled to pay the premium if the mortgagor failed to do so,(*a*) and the amount paid by him for that purpose would be the measure of damages in an action for the breach of that covenant. What distinction is there between that case and this? In Hey *v.* Wyche, 2 Gale & D. 569, the plaintiff, a lessee under covenant to insure against fire in his own name and that of the lessor jointly, assigned to the defendant, who covenanted to keep the covenants in the lease. The defendant having neglected to keep up a fire policy which had been effected, the plaintiff effected a

(*a*) He might be *bound* to do so, as well as to repair the premises, pursuant to the covenants of the mortgagor's lease.

fresh one, but in his own name only. No fire happened. The plaintiff brought covenant against the defendant for neglecting to insure; and the defendant pleaded payment of one farthing into court. The Court
*614] of Queen's Bench held, that, though the plaintiff *had no claim to be indemnified specifically for the sum expended by him in effecting the fresh policy, the jury were at liberty to award more than nominal damages for the risk to which he had been exposed by the defendant's default. [WILLIAMS, J.—That is a very odd case. What materials has the court for estimating the damages between nominal and the amount of the premiums?] Suppose, in the case put, the premises were destroyed by fire, and neither party had kept up the policy, —might not the jury, in an action against the mortgagor upon his covenant, reasonably say that the mortgagee was not entitled to recover the full value because he had omitted to avail himself of the alternative of keeping up the policy himself? The circumstance of the deed in this case providing a cumulative remedy cannot affect the construction of the other covenants. [CROWDER, J.—Then you would say that a covenant by the mortgagor to repay, would be mere surplusage?] It would be unnecessary, in a case like this; though Warburg *v.* Tucker, 5 Ellis & B. 884 (E. C. L. R. vol. 85), shows that in some cases it might be useful.

WILLIAMS, J.—I am of opinion that the defendant is entitled to judgment in this case,—that is to say, I am of opinion that no further damages are recoverable in this action than the nominal damages which have been paid into court. The case has been presented by Mr. *Lush* in two points of view. He has contended, in the first place, that the covenant for the breach of which the action is brought ought to be regarded as a covenant to pay the annual premiums *to the plaintiffs*, and that the measure of damages for a failure to pay such premiums would be the amount of the premiums themselves. I am clearly of opinion that this covenant cannot either directly or indirectly be looked upon as a cove-
*615] nant to pay the premiums to the plaintiffs, because *the plaintiffs themselves are the assured in the policy. There can be no substantial difference between the case as it now stands and what it would have been if the policy had been effected with a third party, and the defendant, having assigned the policy to the plaintiffs, had covenanted to keep it up. The plaintiffs, as it seems to me, stand precisely in the same position, as regards the question before us, as if they had been the assignees of a policy, with the usual covenant on the part of the assignor to keep the policy alive by payment of the premium. That being so, the question is what damages have the plaintiffs sustained by the breach of that covenant? Treating it as a covenant to pay the premiums to a third party, Mr. *Lush's* argument is this,—that the position of the plaintiffs is analogous to that of the mortgagee of a house, the mortgage being to secure a debt, and, being accompanied by an assignment of a policy of insurance, with a covenant on the part of the debtor to keep the policy on foot: and it is said that, in that case, if the mortgagee, on the default of the mortgagor, were to pay the premiums, he might in an action upon the covenant recover the amount he had paid for that purpose. It is further urged that, in substance, that which was done by the plaintiffs here amounts to payment of the premiums, and that the damages must be measured by the payments so made. It is unne-

cessary to decide whether, contrary to the wishes, or without the authority of the debtor, the creditor has a right to pay the premiums and claim to recover the amount as damages, or whether the debtor has not a right to say that he elects to allow the security to drop, because here the deed has provided for the very thing which has happened. This is not like the case where the exact sum paid by the assignee for premiums would be recoverable,—as, where the assignment contains, besides the *covenant by the assignor to pay the premiums, a further covenant that, on failure of the assignor to make the payments, the [*616 assignee may make them for him and be reimbursed. So far from its being a case of that sort, the silence of the deed in that respect, and the provision that a particular mode shall be adopted for securing to the plaintiffs the sums they may pay for keeping the policies alive, amount in effect to an agreement that those sums shall not be repaid, but shall be tacked to the mortgage-debt. It seems to me that the parties having prescribed what shall be the consequences which are to result from a failure on the defendant's part to perform his covenant to pay the premiums, the plaintiffs' remedy must be confined to that, and that they cannot sue for the sums they have paid, but can only treat them as part of the mortgage-debt.

CROWDER, J.—I also am of opinion that our judgment must be for the defendant. I can see nothing to entitle the plaintiffs to recover any further damages in respect of the breach of covenant declared on than the sum which has been paid into court; and I rest my judgment entirely upon the language of the deed. In the first place, I think, we must look at the case as if the insurance had been effected with another office, and the plaintiffs, as assignees of the policy, had paid the premiums on the defendant's default. The omission of the defendant to keep the policy on foot, undoubtedly was a breach of his covenant, for which the plaintiffs would be entitled to maintain an action. But, when we are considering what damages the plaintiffs are to recover, we must not overlook the other provisions of the deed. It is commonly the case that, in addition to the covenant on the part of the assignor to keep up the policy, a power is reserved to the assignee himself to pay the premiums on the assignor's default, and a *further covenant on the [*617 part of the latter to repay the sums which should be so paid by the former. If the deed now under consideration had contained such a covenant as that, the plaintiffs would have been entitled to recover all sums necessarily expended by them for the purpose of keeping the policy alive. But not only does this deed contain no such covenant, there is an express stipulation that, in case the defendant shall neglect to pay the premiums, it shall be lawful for the plaintiffs to pay them, and that the sums so paid shall be charged upon the hereditaments conveyed, and be payable and paid out of any moneys to arise or be received under or by virtue of the mortgage-deed. It has been urged by Mr. *Lush* that this was merely intended as an additional security. But, looking at the deed, it appears to me that the intention of the parties evidently was, to provide that, if the defendant should make default in payment of the premiums, the plaintiffs might pay them, but not that they should have a right of action against him to recover back the sums so paid, but merely that they should be at liberty to add the amount of such payments to the mortgage security. I therefore think

our judgment must proceed upon the apparent intention of the parties, and the absence of the covenant to repay, which is usually found, and the presence of the stipulation I have last adverted to.

WILLES, J.—I am entirely of the same opinion. It seems to me that the true construction of the deed puts an end to all dispute, even assuming that that which was done by the plaintiffs amounts in point of law to payment of the premiums. As to that, I desire to be understood as declining to express my opinion; and I believe that my learned Brothers
*618] do not intend that the judgment of the court should be taken as a *decision that there has been a payment, but that, assuming there had been a payment, the plaintiffs were not entitled upon this covenant to recover back the amount.

WILLIAMS, J., and CROWDER, J., intimated that they had not thought it necessary to consider whether or not that which was done by the plaintiffs amounted to payment. Judgment for the defendant.

SHERIDAN v. THE NEW QUAY COMPANY. *July* 5.

A., who resided at Manchester, contracted to buy of B., at Dumfries, a quantity of oak-bark, to be shipped "for delivery at Liverpool." B. accordingly shipped the bark, to be delivered at Liverpool to the defendants, who were wharfingers and carriers there, to be by them forwarded to A. at Manchester. The bark was to be paid for in cash; and B. sent a bill of lading, making it deliverable to "A. or his assigns," together with a bill of exchange payable on demand, through his bankers, to the Manchester and Salford Bank, with instructions to present the bill for acceptance. The bank at Manchester were unable to find A., and accordingly they returned the bill of lading and draft to B. Before the bill of lading had been so returned, B., who was at Liverpool when the bark arrived there, believing from the representations of an agent of the plaintiff (who had bought the bark of A.), that the bill of lading had been duly handed over to A., assented to the bark being delivered to the defendants for the purpose of its being carried to Manchester for the plaintiff; but, upon subsequently discovering that A. had not got the bill of lading or paid for the bark, B. claimed and received it from the defendants:—

Held, that, under the circumstances, the property in the bark never passed to A., and consequently that B. had a right to countermand the delivery; and that it was competent to the defendants, notwithstanding they had received the bark to be carried for the plaintiff, to set up the title of B., in an action brought against them by the plaintiff.

THE first count of the declaration stated, that the defendants were common carriers of goods for hire from Liverpool to Manchester, and that the plaintiff, by certain persons as his agents, caused certain goods to be delivered to the defendants as such carriers, to be carried from Liverpool to Manchester, and there delivered by the defendants accord-
*619] ing to the order of the agents *of the plaintiff; that the defendants received the goods, and that the agents of the plaintiff ordered the defendants to carry the goods to Manchester, and there deliver them to the plaintiff; and that, although a reasonable time had elapsed for the delivery of the goods, the defendants had not delivered them, and unjustly withheld them from the plaintiff.

The second count was in trover, for the conversion of oak-bark.

The defendants pleaded, to the first count,—first, a denial that the plaintiff delivered the goods to the defendants, or that the defendants received the goods, in manner and form as alleged,—secondly, a denial that the agents of the plaintiff ordered the defendants to carry and convey and deliver the goods as alleged,—thirdly, a denial that the

plaintiff was ready and willing to accept the goods, or to pay the reward payable on the delivery of the goods,—fourthly, a denial of the breach, —fifthly, a special plea, that the goods, at the time of the delivery and receipt of them, were the proper goods of Messrs. George and James Donaldson, of Corsock, near Dumfries, in Scotland, timber-merchants: and that they were induced to part with the possession of them, and caused the same to be delivered to the defendants as alleged, for the plaintiff, under a colourable and fictitious sale and purchase thereof on the part of the plaintiff from the said Messrs. Donaldson, and by and through the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him; and that, before any breach of the alleged contract in the first count mentioned, Messrs. Donaldson stopped the goods in the hands of the defendants, and gave notice to the defendants not to deliver them to the plaintiff, but to return them to Messrs. Donaldson, and that the defendants returned the goods to Messrs. Donaldson accordingly.

*The defendants pleaded to the second count,—first, not guilty,—secondly, that the goods were not the plaintiff's goods. [*620

The plaintiff joined issue on these several pleas.

The cause came on to be tried at Liverpool, before Crompton, J., when a verdict was found for the plaintiff, subject to the following case:—

The plaintiff is a commission agent at Manchester. The defendants are common carriers of goods for hire between Liverpool and Manchester: and the plaintiff seeks to recover from the defendants the value of a quantity of oak-bark, under the following circumstances:—

In May, 1856, a person named Isaac Cooper, who was then residing in Manchester, inserted an advertisement in the papers, for oak-bark; and, in consequence of that advertisement, the following correspondence took place between Messrs. Donaldson and Isaac Cooper.

"Corsock, by Dumfries, 30th May, 1856.

"Mr. Isaac Cooper.

"Sir,—In reference to your advertisement for oak-bark, we beg to inform you that we can supply you with, say from 30 to 40 tons (of 20 cwt.) put free on board at Tongland, near Kirkcudbright, for 5*l.* 5*s.* per ton.

"For G. & J. DONALDSON,
"JAMES M'PHERSON."

"Messrs. G. & J. Donaldson. "Manchester, 2d June, 1856.

"Gentlemen,—Your letter of the 30th ult. came duly to hand. If the oak-bark is strictly in accordance with the advertisement, I will take the quantity mentioned in your letter: but allow me to suggest I think your price is to the full extent. You may, therefore, put on board the quantity, to be shipped *for delivery at Liverpool*, and I will give instructions to my agent there to *receive the same. Waiting to hear from you as to the time you make the shipment, and I shall make arrangements respecting payment thereof. [*621

"Your obedient servant, "ISAAC COOPER."

"Mr. Isaac Cooper. "Corsock, by Dumfries.

"Sir,—We have received your letter of the 2d instant. With regard to the quality of the bark, we may state that the wood is good and

healthy, and from sixty to seventy years' growth. It is to be understood that the bark is to be taken delivery of when shipped; and the time of shipping to be twixt 20th July and not later than the middle of August. "For G. & J. DONALDSON,

"JAMES M'PHERSON."

"P. S. Will be shipped either at Tongland or Pancakie, the freight being the same from both."

"Corsock, by Dumfries, 12th June, 1856.

"Mr. Isaac Cooper.

"Sir,—I expected to have had a reply to my letter of the 5th instant regarding the bark 'ere this time, and will feel obliged by your doing so in course of post, as other parties are applying. I may state that my usual terms of payment are cash on delivery: but, not having the pleasure of your acquaintance, I have no objection to make payment against bill of lading, by your sending me a reference.

"For JAMES DONALDSON,
JAMES M'PHERSON."

"Mr. Donaldson. "Manchester, 14th June, 1856.

"Sir,—I duly received yours of the 12th instant. In reply beg to state that absence from home prevented me answering yours of the 5th
*622] earlier: but, however, *with respect to reference, beg to refer you to Mr. James Wrigley, merchant, Hulme, near Manchester, who will no doubt satisfy you as to my respectability. But I consider the best reference to be cash, which I shall remit you prompt *on receipt of the bark.* "ISAAC COOPER."

"Corsock, by Dumfries, 16th June, 1856.

"Mr. Isaac Cooper.

"Sir,—I have received your letter of the 14th instant, but you do not state whether you are to engage a vessel yourself for shipping the bark, or whether you wish me to do so. You will notice, from ours of the 30th ult. and 12th inst., that our offer is 5*l.* 5*s.* per ton of 20 cwt. put free on board either at Tongland or Pancakie. But, if you wish me to engage a vessel for you, I will do so as reasonable as I possibly can. Please to write as to this by return of post, as part might be shipped this month, if you wish. "Pro JAMES DONALDSON,

"JAMES M'PHERSON."

"Mr. James Donaldson. "Manchester, 19th June, 1856.

"Sir,—Yours of the 16th inst. is duly to hand. In reply, I beg to say that you had better engage a vessel for me at as reasonable a rate as you possibly can: and, with respect to the shipping a part this month, I should prefer your doing so if convenient: and, as regards our former correspondence, which you mentioned in yours, I perfectly understand it, and that our agreement is 5*l.* 5*s.* per ton, shipped at either of the places you name,—at that which is most convenient for you.

"ISAAC COOPER."

"Corsock, by Dumfries, 5th July, 1856.

"Mr. Isaac Cooper.

"Sir,—I have engaged a vessel, the Mart, of Perth, *to load
*623] with oak-bark for you at 20*l.* freight. She carries 72 tons dead

weight. I expect to have her loaded about the middle of the week. You will, therefore, please write me on receipt the name of the party the captain is to call upon, on arriving in Liverpool.

"Pro JAMES DONALDSON,
"JAMES M'PHERSON."

"Mr. James Donaldson. "Manchester, July 8, 1856.

"Sir,—In reply to yours of the 5th inst., beg to inform you that the captain is to deliver the oak-bark to the New Quay Company, carriers, to Manchester, who will pay the captain his freight: and please to say when the vessel will be likely to arrive in Liverpool, as every attention shall be paid mean time. "ISAAC COOPER."

"Corsock, 9th July, 1856.

"Mr. Isaac Cooper.

"Sir,—I have received yours of yesterday's date. Should the wind be northerly, the vessel will arrive at Liverpool with bark the beginning of next week. "Pro JAMES DONALDSON,
"JAMES M'PHERSON."

Messrs. Donaldson engaged the Mart for Cooper, as stated in their letter of the 5th of July, to take a little less than twenty-four tons of the bark to Liverpool; and, the bark having been loaded on board the Mart, on the 12th of July procured the master to sign the following bill of lading,—

"Shipped by the grace of God, in good order and well conditioned, by G. & J. Donaldson, in and upon the good ship or vessel called the Mart, of Perth, whereof is master for this present voyage John Amess, and now lying in the harbour of Pancakie, bound for Liverpool, *to say, cargo of oak-bark, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Liverpool (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted), unto Isaac Cooper or to assigns, he or they paying freight for the said goods. Pay the master in full of freight 20*l.* sterling, with primage and average accustomed. In witness whereof, the master or purser of the said ship or vessel hath affirmed to one bill of lading, &c. Dated, &c. [*624
"JOHN AMESS (quantity unknown)."

Messrs. Donaldson afterwards drew a bill on Cooper for 125*l.* 12*s.*, "value in oak-bark," payable on demand.

Messrs. Donaldson delivered the bill of lading and the draft to the Union Bank of Scotland, at Castle Douglas, to be transmitted to Manchester; and the Union Bank of Scotland, accordingly, on the 14th of July, 1856, transmitted the bill of lading and the draft to the Manchester and Salford Bank. Messrs. Donaldson also sent to Isaac Cooper the following invoice:—

"Corsock, by Dumfries,
"14th July, 1856.

"Mr. Isaac Cooper, Knot Mills, Great Bridgewater Street, Manchester, "To G. & J. Donaldson.

"Shipped by the ship Mart, of Perth, 23 tons, 18 cwt., 2 qrs., 7 lbs., at 105*s.* per ton, £125 12*s.* 11*d.*"

Mr. Cooper sent the following letter to Mr. James Donaldson:—

"Knot Mill, Great Bridgewater Street,
"Manchester, 16th July, 1856.

"Mr. James Donaldson.

*625] "Sir,—Yours is duly to hand this morning. Also *your letter of the 9th was received in due course. I am expecting to hear by an early post of the arrival of the vessel in Liverpool, although the wind has not been favourable since Sunday night, which accounts for the delay. "ISAAC COOPER."

On the receipt of the draft, the Manchester and Salford Bank made every inquiry for Cooper, both in Great Bridgewater Street and in Knot Mill and the neighbourhood, in order to present the draft to him for payment; but the bank was unable to obtain any information whatever about Cooper; and thereupon the bank returned the draft along with the bill of lading to the Union Bank of Scotland, by whom it was delivered to Messrs. Donaldson.

On the 14th of July, 1856, Isaac Cooper sent to the defendants (the New Quay Company), at Liverpool, the following letter:—

"Knot Mill, Great Bridgewater Street,
"Manchester, 14 July, 1856.

"Gentlemen,—I have a cargo of bark from Dumfries shipped by the Mart, of Perth, vessel, which I expect in daily, and have ordered to come into your hands. The captain's charge for freight is 20*l.*, which I will remit you, or send, as soon as she comes to Liverpool, with further instructions. Be good enough to inform me of the arrival.

"ISAAC COOPER."

About the same 14th of July, one G. D. Thomas, as agent for Isaac Cooper, applied to the plaintiff, in Manchester, to advance the freight of some bark which was coming from Scotland to Liverpool. Thomas saw the plaintiff two or three times on the subject; and, ultimately, on Tuesday, the 15th of July, the plaintiff agreed with Thomas to advance

*626] 20*l.* through the *plaintiff's agents, Buchanan & Co., of Liverpool, to pay the freight of the bark, on having the bark transferred to his order. On the same day, Isaac Cooper was introduced to the plaintiff (who had no previous acquaintance with him) at Manchester; and the plaintiff informed him that he had agreed to advance (through his agents, Buchanan & Co., of Liverpool) 20*l.* for the freight of the bark, on having the bark transferred to his order. Isaac Cooper then offered to sell the bark to the plaintiff. The plaintiff inquired the value of the bark, and Cooper informed him that he had purchased it at 5*l.* 5*s.* per ton; and he produced and delivered to the plaintiff Messrs. Donaldson's invoice of the bark, dated the 14th July, and left it with him. The plaintiff then offered to give Cooper 10*s.* per ton advance on the invoice price. Cooper said he would let the plaintiff know; but no agreement for the sale of the bark from Cooper to the plaintiff was concluded on that day.

On the 17th of July, the Mart arrived in Liverpool, with the bark on board; and the master reported his arrival to Mr. Matton, the agent of the defendants, in Liverpool. Mr. Matton the same day wrote a letter to Isaac Cooper in Manchester, informing him of the arrival of the

vessel with the bark; and Cooper sent to Mr. Matton by post, the following letter:—

"Knot Hill, Great Bridgewater Street,
"Manchester, 17 July, 1856.

"Gentlemen,—Your note of to-day came duly to hand, of the arrival of the vessel laden with bark for me. I have ordered Buchanan & Co. to call on you to pay freight, &c.; and you may act by their instructions. "ISAAC COOPER."

The Buchanan & Co. mentioned in the above letter consisted of a Mr. John Buchanan, who carried on *business as an agent in Liverpool, and who had been in the habit of acting as agent for [*627 the plaintiff in Liverpool, and who was acting as agent for the plaintiff on this occasion. The plaintiff had, previous to the arrival of the bark in Liverpool, informed Mr. John Buchanan that he had a cargo of bark coming from Scotland to Liverpool; and the plaintiff had also informed Isaac Cooper that Mr. John Buchanan was the person who would act as his agent at Liverpool, and who would pay the freight of the bark.

On Saturday the 19th of July, the plaintiff had an interview with Issac Cooper at Manchester; and it was then agreed between them that the plaintiff should buy the bark of Cooper at an advance of 10*s.* a ton on the invoice price; and Isaac Cooper left Messrs. Donaldsons' invoice of the bark with the plaintiff. Isaac Cooper the same day sent the following telegram to the defendants, at Liverpool:—

"Please to transfer the bill of lading belonging to me to Buchanan & Co., 9 North John Street, Liverpool."

After Mr. Matton had received the telegram on the 19th of July, Mr. John Buchanan called upon him, and asked him whether he had got a communication from Cooper, to hold a quantity of bark at his disposal. Matton said he had got, first a letter authorizing him to hold the bark at Buchanan's disposal, and that he had that day also received a telegraph message to hand over a bill of lading. Buchanan said that he did not know there was a bill of lading; but he should require something to show the captain before he could get possession. Buchanan wished the bark to be taken to Manchester, and the freight to be paid there; but Matton said that the freight must be paid in Liverpool. Buchanan asked Matton to give an order on the *captain. Matton then, [*628 in Buchanan's presence, and at his request, wrote and delivered to Buchanan the following order:—

"Liverpool, July 19th, 1856.

"To captain and owners of the Mart, of Perth.

"You will please deliver to the order of Messrs. Buchanan & Co. the cargo of bark per said vessel, from Dumfries, they paying all expenses of freight, &c. "For the New Quay Company,
"JOSEPH MATTON."

Mr. John Buchanan went to Manchester the same evening, and forwarded the order to the plaintiff's residence, with a note informing him that the bark could not be delivered unless the freight was paid, and afterwards returned to Liverpool. On Monday morning, the 21st of July, the plaintiff transmitted 20*l.* in notes to Mr. John Buchanan in a parcel to Liverpool, and also sent him back the order on the captain.

Mr. James Donaldson arrived at Liverpool on Saturday the 19th of July.

On Monday the 21st, after Mr. John Buchanan had received from the plaintiff the 20*l.* and the defendants' order, Mr. James Donaldson and Mr. John Amess (the master of the Mart) called together on Mr. John Buchanan. The master asked Mr. John Buchanan to give him a little money on account of the freight. Mr. Buchanan said he was prepared to pay all the freight. Mr. Buchanan asked the master where the bill of lading was. The master said he did not know where it was, though he had signed one; but that here was the master of the bark, meaning Mr. Donaldson. Mr. Donaldson said that he had passed the bill of lading on to Cooper, and it should have been in their possession by now. Mr. Buchanan said the thing was all right; he had the freight in his pocket.

*629] Mr. Buchanan then made an *appointment for them to meet him at the defendants' office at half-past two in the afternoon. The master accordingly met him at the defendants' office; but Mr. Donaldson did not accompany him. The master produced the following order:—

"The New Quay Company, carriers to Manchester, on behalf of Mr. Isaac Cooper.

"Corsock, 12th July, 1856.

"Gentlemen,—Please to pay Mr. John Amess the sum of 20*l.* sterling, in full of freight of bark per sloop Mart.

"Pro JAMES DONALDSON,
"JAMES M'PHERSON."

Mr. Buchanan paid the master the 20*l.* for the freight; and the following receipt was written across the last-mentioned order, and signed by the master, and a receipt stamp affixed to it,—"Received from Messrs. Buchanan & Co. the sum of twenty pounds, as freight (on the bark) per sloop Mart, at Perth.

£20. "JOHN AMESS."

Mr. Buchanan than showed Mr. Matton the last-mentioned order and receipt, and asked Mr. Matton if he could take the bark up for Mr. Sheridan to Manchester, and stow it for him there. Mr. Matton told him he could. Mr. Buchanan then wrote the following directions across the defendants' order of the 19th of July,—

"The New Quay Company will please to forward the cargo of bark per Mart, of Perth, to Manchester, and there to warehouse it for Mr. John B. Sheridan, 34, Cannon Street, Manchester, or his order, and please to pay the charges thereon, the freight being paid here, on his account, by us, and oblige,

"BUCHANAN & Co.,
"9, North John Street."

*630] *Mr. Buchanan left that order with Mr. Matton.

On the 22d of July, the plaintiff, at Cooper's request, paid Cooper 21*l.*, and took from him a receipt for 41*l.* as paid on account of freight and expenses of oak-bark.

The plaintiff had not heard there was any dispute about the bark at the time he paid the 41*l.*

On the 23d of July, about two-thirds of the bark was removed

from the Mart into one of the defendants' boats, to be taken to Manchester.

After this had been done, the master of the Mart. and *some one else*, called on Mr. Matton; and the master asked Mr. Matton if the bill of lading had come to hand. Mr. Matton said he was not aware there was one. The master then told Mr. Matton he could not have the bark, and what had been put into the boat must be taken out, and that he should take back what was in the boat unless Mr. Matton would produce the bill of lading. Mr. Matton said that would be a great trouble and annoyance; and asked if there was no other mode of arranging it. The master then went away and saw the ship-brokers, and subsequently returned to Mr. Matton with a letter, and said that Mr. Matton could take the remainder of the bark and all of it to Manchester, subject to his order. The master then delivered to Mr. Matton the following letter:—

"Mr. Joseph Matton, agent for the New Quay Company.

"Liverpool, 23d July, 1856.

"Sir,—I request that you will not deliver the cargo of bark received by you this day from the sloop Mart, Dalbealtie, until the bill of lading signed by me for the same is produced by the party applying for the said bark on its arrival at Manchester.

"JOHN AMESS, Master."

**Mr. Matton assented to the terms of the said letter.* The residue of the bark was then unloaded into the defendants' boat; [*631 and the defendants' boat, with the bark on board, left for Manchester on the same 23d of July.

In the boat's manifest, the bark was entered as consigned to the plaintiff, or his order. Mr. Matton, on the same 23d of July, wrote and sent to Isaac Cooper, by the post, the following letter:—

"Liverpool, July 23d, 1856.

"Mr. Isaac Cooper.

"Sir,—We are sending forward the bark ex Mart to the address of Mr. John B. Sheridan, Manchester, by order of Messrs. Buchanan & Co.; and I have to inform you that, *no bill of lading having yet been presented*, the captain has given us a letter requesting that we do not deliver the said bark until the bill of lading signed by him be produced.

"For the New Quay Company,

"J. MATTON."

On the 24th of July Mr. Donaldson telegraphed from Castle Douglas to Messrs. Wilson & Co., his agents in Liverpool, to stop the bark; having previously, on the same day received the draft and bill of lading returned from Manchester.

The plaintiff first heard that the defendants refused to deliver the bark to him on the 24th of July; and he then instructed Mr. Buchanan to call on Mr. Matton and ask the reason why they would not deliver the bark. Mr. Buchanan, accordingly, on the 25th of July, called on Mr. Matton, and asked him why the New Quay Company would not deliver the bark according to his orders; when Mr. Matton said there was some dispute about the ownership of the bark, and took Mr. Bu-

*632] chanan up stairs to see Mr. Hall, the Manchester *manager for the defendants. Mr. Buchanan told Mr. Hall that it was unreasonable detaining the goods after receiving them from the plaintiff. Mr. Hall said the goods were obtained by fraud, and advised Mr. Buchanan to have nothing to do with the matter. Mr. Buchanan told him that he had no interest in the matter further than acting as agent for the plaintiff. Mr. Hall then asked Mr. Matton to bring up the company's order with Mr. Buchanan's cross order upon it. Mr. Hall read the order over, and said it was all right as far as that was concerned. The plaintiff subsequently instructed his attorney to apply to the defendants on the subject; and Mr. Potter, his attorney, wrote and sent to Mr. Hall, the defendants' manager at Manchester, the following letter:—

"13, Cooper Street, Manchester, 26th July, 1856.

"The New Company.

"I have been instructed by Mr. Sheridan to state, that, unless you immediately deliver to him the bark forwarded by your company to his order by Messrs. Buchanan & Co., of North John Street, Liverpool (your charges upon which he is prepared to pay, as already intimated to you), he will hold you responsible for all damages he may sustain, and commence legal proceedings against you without further notice.

"MICHAEL POTTER."

To this Mr. Hall, on the part of the defendants, returned the following answer:—

"New Quay Company, Water Street, Manchester,
"28th July, 1856.

"Sir,—In reply to yours of the 26th instant, I beg to inform you *633] that I have prior instructions to hold the *bark to order of consignors until the production of the bill of lading.

"WILLIAM HALL."

The bark arrived in Manchester on the 24th of July, and was warehoused by the defendants in one of their warehouses at Manchester. On the 29th of July, 1857, Mr. James Donaldson agreed to sell the bark to Mr. Middleton, a tanner, in Manchester, at 6*l.* 9*s.* per ton, less 2½ per cent. discount. The defendants thereupon delivered to Mr. Middleton a debit-note of their charges, amounting to 14*l.* 16*s.*

Jonas Greenwood, a workman in Mr. Middleton's employ, was shortly afterwards sent to the defendants' wharf by Mr. Middleton, to cart away the bark. After removing part of the bark, the company's servants interfered, and refused to allow him to cart away the remainder, until he had paid the 14*l.* 16*s.* for carriage hire. Greenwood subsequently produced the debit-note which had been delivered to Mr. Middleton, and paid the defendants the 14*l.* 16*s.*; and the defendants' agent wrote a receipt on the debit-note. The defendants' servants then delivered the remainder of the bark to Greenwood on account of Mr. Middleton, and he carted it away.

It is not unusual for there to be no bill of lading for goods carried by sea, in the coasting-trade.

The question for the opinion of the court is, can the plaintiff maintain this action against the defendants. If the court shall be of opinion

that the plaintiff can maintain this action against the defendants, the verdict is to be entered for the plaintiff on such issues as the court may direct, and for such an amount of damages as the court may direct. If the court shall be of opinion that the plaintiff cannot maintain this action against the defendants, the verdict is to be entered for the defendants on such issues as the court may direct.

*The court is to be at liberty to draw any inference of fact which a jury might draw. [*634

Mellish (with whom was *Hill*, Q. C.), for the plaintiff.—The Messrs. Donaldson, the original owners of the bark in question, contracted to sell it to Cooper, to be paid for on receipt of the bill of lading, and Cooper contracted to sell it to the plaintiff, a bonâ fide purchaser for value, and without notice of any fraud. Messrs. Donaldson shipped the bark for Liverpool, sending to Manchester a bill of lading, to be handed to Cooper there on payment of the price of the bark. Cooper, however (who it was plain intended to get possession of the bark without paying for it), could not be found. The vessel with the bark on board having arrived at Liverpool, the master addressed himself to the defendants, by whom as carriers the bark was to be conveyed to Manchester for Cooper. The freight to Liverpool having been paid there, the bark is carried thence by the defendants to Manchester, and there warehoused by them for the plaintiff. The defendants, however, subsequently choose to attorn to the Messrs. Donaldson; and they sell the bark to one Middleton, to whom the defendants deliver it. Under these circumstances, two questions are presented for the opinion of the court,—first, whether, as between Messrs. Donaldson and the plaintiff, there was a delivery of the bark to the plaintiff,—secondly, whether there was or not, was there not such a contract for the carriage of the bark for the plaintiff as to preclude the defendants from questioning his title to it. The only answer which could be suggested to the first of these propositions, is, either that there was stoppage in transitu, or that there was such fraud on the part of Cooper as to render the sale to him voidable. Now, ordinarily, the right of an unpaid vendor to stop goods in transitu is at an end when the goods *have either actually or constructively arrived at their destination, and reached the hands of the consignee: and, [*635 although, as between the vendor and vendee, the contract may be voidable on the ground of fraud, the former cannot declare his election to treat it as void after the goods have, as here, passed into the hands of a bonâ fide purchaser for value: that is clearly established by White *v.* Garden, 10 C. B. 919 (E. C. L. R. vol. 70). As between Messrs. Donaldson and the plaintiff, there clearly was a delivery of the bark to him when it was delivered to the defendants, who were to carry it as his agents from Liverpool to Manchester. Even before the bark was delivered into the barges of the New Quay Company, there was a constructive delivery to the plaintiff. James Donaldson having assented to the payment of the freight at Liverpool by Buchanan, the plaintiff's agent, it was not competent to him afterwards to intercept the delivery of the bark to the plaintiff. The delivery of part of the bark would, as a general rule, enure as a delivery of the whole, so as to vest the property in the whole in the consignee: Slubey *v.* Hayward, 2 H. Black. 504; Hammond *v.* Anderson, 1 N. R. 69. In Bunney *v.* Poyntez, 4 B. & Ad. 568 (E. C. L. R. vol. 24), that rule was held not to apply where there

was a manifest intention to separate the part delivered from the residue: and Pollock, C. B., observing upon that case in Tanner *v.* Scovell, 14 M. & W. 28, 36,† says,—"Lord Tenterden says in the case of Bunney *v.* Poyntez, that the delivery in Slubey *v.* Hayward was 'the delivery of part of the cargo, made in the progress of and with a view to the delivery of the whole;' because you could not take the whole of the cargo at one time, but must take hogshead by hogshead, or sack by sack, as the case may be. If there was no intention to separate the particular part delivered from the remainder, that incipient delivery, so *636] to speak,—that inchoate delivery—will amount to a *determination of the right to stop in transitu." Here, the delivery of the twenty tons was made in the progress of and with a view to the delivery of the whole. [CROWDER, J., referred to Crawshay *v.* Eades, 1 B. & C. 181 (E. C. L. R. vol. 8), 2 D. & R. 288 (E. C. L. R. vol. 16), where Bayley, J., says: "There can be no doubt, that, wherever there is a complete delivery of part of one entire cargo to the consignee, the transitus is ended, and the consignor cannot stop the remainder." WILLES, J.—Was not the acceptance of the bill of lading a condition precedent to the vesting the property in the bark in the buyer?] It is by no means usual to have bills of lading in the coasting-trade. At all events, it is not competent to the defendants, after they have once assented to the plaintiff's title, by receiving, carrying, and warehousing the goods for him, to repudiate it, and set up the right of a third person: Gosling *v.* Birnie, 7 Bingh. 339 (E. C. L. R. vol. 20), 5 M. & P. 760.

Manisty, Q. C. (with whom was *Knowles*, Q. C.), for the defendants.—Having regard to all the circumstances disclosed in the special case, the property in the bark, as between Messrs. Donaldson and Cooper, never passed to the latter. If, upon the whole, the court can see that there was no intention on the part of the vendors that the property should pass until the bill of lading had been accepted and paid for, and that the vendee was cognisant of that, the property did not pass. All the cases establish that. And if no property passed to Cooper, the plaintiff cannot stand in a better position in that respect: Wait *v.* Baker, 2 Exch. 1.† In the course of the argument of that case, Parke, B., says: "Property never passes, unless there be some agreement to the effect that the property shall pass." And, afterwards, in giving judgment, the same learned judge says: "It would depend upon circum- *637] stances whether the property passes, or whether merely the *original contract is altered from one which would have been satisfied by the delivery of any carriage answering the terms of the contract, into another contract to supply the particular carriage,—which in the Roman law was called obligatio certi corporis, where a person is bound to deliver a particular chattel, but where the property does not pass, as it never did by the Roman law, until actual delivery; although the property, after the contract, remained at the risk of the vendee, and, if lost without any fault in the vendor, the vendee, and not the vendor, was the sufferer. The law of England is different: here, *property does not pass until there is a bargain with respect to a specific article, and everything is done which, according to the intention of the parties to the bargain, was necessary to transfer the property in it.*" [WILLES, J., referred to Van Casteel *v.* Brooker, 2 Exch. 691.†] This doctrine was acted upon in Brandt *v.* Bowlby, 2 B. & Ad. 932 (E. C. L. R. vol. 22), and

as strongly expressed as in any case in the books. There, B., a merchant in England, in June and July, 1830, sent orders for the purchase of corn to the plaintiffs in Russia, desiring them to draw upon H. & Co. in London for the amount, and he chartered a ship belonging to the defendants, and sent it to Russia to be freighted. On the 28th of July, B. wrote a letter, cancelling the orders he had given. Upon the 8th of August, 1830, the plaintiffs informed B. that they had purchased a cargo for the ship, and should despatch it as soon as possible, addressed to H. & Co., London, expressing a hope that he would approve of what they had done, notwithstanding his last-mentioned communication. The cargo was afterwards shipped, and the plaintiffs by letter informed B. that they had shipped it on his account, and that they had forwarded an *endorsed* bill of lading to H. & Co., drawing upon them for part of the price, and upon him (B.) for the residue; and they *enclosed an *unendorsed* bill of lading to B., and an invoice of the wheat, in which it was stated to be bought for his order and on his account. The bills of exchange enclosed in this letter were dishonoured, whereupon the plaintiffs' agent in London delivered the endorsed bill of lading to H. & Co. On the 2d of October, B. confirmed the revocation of his order, and on the 24th of November the agent of the plaintiffs in England gave notice to the agent of B. that he should retain the whole of the wheat for the plaintiffs. B. afterwards became desirous of having the wheat, and the master of the vessel in which the wheat was shipped delivered it to B.'s orders, and not to H. & Co. pursuant to the bill of lading. In an action brought against the shipowners for not delivering pursuant to the plaintiffs' orders, it was contended that the plaintiffs were entitled to recover nominal damages only, because the property in the wheat had actually vested in B. by the shipment. But the court held that the property did not vest in B. absolutely upon the shipment, but only subject to a condition, that the bills were accepted; and that, in default of acceptance, it never did vest in him; and, consequently, that the plaintiffs were entitled to recover the value of the wheat at the time when it was delivered to B.'s order. Bayley, J., there says: "I agree to the law laid down in argument, that a contract cannot be rescinded by one only of two contracting parties; but the question in this case is, whether the property in the goods shipped ever vested in B. at all. That depends entirely on the intention of the consignors. The fact of their transmitting the *unendorsed* bill of lading to B., and an *endorsed* one to H. & Co., shows clearly that they did not intend that the property in the wheat should vest absolutely in B., but should be subject to a condition that the bills were accepted." Turner *v.* The Trustees of the Liverpool Docks, *6 Exch. 543,† and many other cases, are to the same effect. In the present case there is abundant evidence that the bark was never intended to vest in Cooper until he had accepted the bill of lading and paid the price. The important point of time is, when the bark had arrived at Liverpool and the parties met. All of them knew that there was a bill of lading, without which neither Cooper nor any person claiming through him could get the bark. [CROWDER, J.—Did not the defendants undertake to carry for and deliver to the plaintiff?] The question is, was there any delivery? It is submitted that there was not: the bark was put on board the company's boats upon the faith of Buchanan's assertion that all was right.

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[WILLES, J.—Can you set up the jus terii?] It was allowed in Coxe *v.* Harden, 4 East 211, 1 J. P. Smith 20. A delivery under a mistake, or procured by fraud, is no delivery: Bishop *v.* Shillito, 2 B. & Ald. 329 n.; Godts *v.* Rose, 17 C. B. 229 (E. C. L. R. vol. 84). [WILLES, J.—The sending a bill for acceptance through an agent, to whom the bill of lading is also sent, is evidence that the delivery is conditional on the acceptance of the bill: Wilmshurst *v.* Bowker, 7 M. & G. 882 (E. C. L. R. vol. 49), 8 Scott N. R. 571; Key *v.* Cotesworth, 7 Exch. 595.†] The question is whether the goods were still in transitu, and whether Messrs. Donaldson had a right to stop them. In the notes to Lickbarrow *v.* Mason (2 T. R. 63, 1 H. Bl. 357, 6 East 21), in 1 Smith's Leading Cases (4th edit.) 646, it is said: "The rule to be collected from all the cases, is, that goods are in transitu so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission. But that, if, after their arrival at their place of destination, they be warehoused with the carrier, whose store the vendee uses as his own, or even if they be ware-
*640] housed with the vendor himself, *and rent be paid to him for them, that puts an end to the right to stop in transitu." If that be the true rule, it is clear that the bark in question was in course of transmission until it reached Manchester, the place of its ultimate destination. [WILLIAMS, J.—If Messrs. Donaldson had demanded the bark, the defendants would have had no answer. That shows that they ought to have the right to set up the jus tertii; otherwise, they might be liable to two actions.] The right to stop in transitu subsists until the goods have come to the actual possession of the buyer as owner: James *v.* Griffin, 1 M. & W. 20.†

Mellish, in reply, referred to 1 Smith's Leading Cases 646, where it is said: "The arrival of the goods at a place where they are to be at the orders of the buyer, in the hands of persons who are to keep them for him, is an end of the transitus, although the place be not that of their ultimate destination: Wentworth *v.* Outhwaite, 10 M. & W. 436;† Dodson *v.* Wentworth, 5 Scott N. R. 821, 4 M. & G. 1080 (E. C. L. R. vol. 43); because in such a case the goods have got into the hands of agents for the buyer, not concerned merely in the carriage of the goods. And the same, as it seems, where the goods have got into the hands of a person employed by the buyer to receive them from the first carrier, or out of the warehouse where they were when sold, and give them a new destination, as in Valpy *v.* Gibson, 4 C. B. 837 (E. C. L. R. vol. 56)."

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

This was an action brought to recover the value of a quantity of oak-bark alleged to belong to the plaintiff.

The first count was against the defendants as common carriers for not delivering the oak-bark at Manchester, pursuant to a delivery to them by the plaintiff for that purpose at Liverpool. The second count was in trover.

*641] *The material pleas to the first count are, one which denies the bailment, and another which states that the goods, before their bailment to the defendants, had been fraudulently obtained by the plaintiff from Messrs. Donaldson, to whom they belonged, and that, after

such bailment, and before any breach of duty on the defendants' part, Donaldsons demanded the goods, and the defendants delivered them up to them, which is the cause of action complained of.

It appears that a person named Cooper, who resided at Manchester, ordered the goods of Donaldsons, who were in business at Dumfries, in Scotland. They were shipped at Dumfries free on board the Mart (Amess), a vessel provided by Donaldsons at the request of Cooper, but of which Donaldsons were not the owners, to be delivered at Liverpool to the defendants, who were wharfingers and carriers there, to be by them forwarded to Cooper at Manchester.

The bill of lading was obtained by Donaldsons on the 12th of July, and it was made out deliverable to Cooper or his assigns. On the same day, Donaldsons signed an authority to the master in the following terms, addressed to "The New Quay Company, carriers to Manchester, on behalf of Mr. Isaac Cooper:"—

"Corsock by Dumfries, 12 July, 1856.

"Gentlemen,—Please to pay Mr. John Amess the sum of 20*l.*, in full of freight of bark per sloop Mart."

Some obscurity has arisen from this document having been introduced into the special case out of the order of time: but it is clear, from the date, that it was given to the master at the time the bill of lading was signed.

The goods were to be paid for in cash against the bill of lading. Accordingly Donaldsons, on the 14th of July, drew upon Cooper for the price at "on demand," and forwarded the bill of lading and the bill of exchange through their bankers to the Manchester and *Salford Bank, with instructions to present the bill for acceptance. [*642 The effect of this course was, that Donaldsons did not part with the bill of lading; and their evident intention was, not to do so until Cooper accepted the bill for the price of the goods. Such acceptance was a condition precedent to the acquisition of any right by Cooper to the bill of lading or the possession of the goods: and, indeed, the transaction being for cash, the bank at Manchester would doubtless not have parted with the bill of lading until the bill of exchange was not only accepted, but paid. The bank, upon receipt of the documents, sought Cooper in vain at the address which he had given. He was not to be found: and indeed it is obvious that he could not, or did not intend to pay for the goods, and wanted to obtain them or their value without payment. After many fruitless inquiries for him, the Manchester and Salford Bank at length returned the documents to Donaldsons at Dumfries, who received them back here on the 24th of July.

On the 14th of July, Cooper wrote, in appearance from the address where he was not to be found by the bank, the following letter to the defendants:—

"Gentlemen,—I have a cargo of bark from Dumfries, by the Mart, of Perth, which I expect in daily, and have ordered to come into your hands. The captain's charge for freight is 20*l.*, which I will remit you or send as soon as she comes to Liverpool, with further instructions. Be good enough to inform me of the arrival."

Cooper never in fact paid even the freight; and that was afterwards paid by Buchanan & Co., of Liverpool, the agents of the plaintiff, under the following circumstances:—

The plaintiff was, on the 14th of July, applied to by Thomas, as agent for Cooper, to advance the freight. *On the 15th of July, he agreed to do so, upon having the bark transferred to his order. He on the same occasion offered to buy it of Cooper at an advance of 10s. per ton on the invoice price; and Cooper asked time to consider the offer.

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On the 17th of July the vessel arrived in Liverpool; and on the same day Cooper was informed by the defendants of her arrival, and wrote them the following letter:—

"Gentlemen,—Your note of to-day came duly to hand, of the arrival of the vessel laden with bark for me. I have ordered Buchanan & Co., of North John Street, Liverpool, to call on you to pay freight, &c.; and you may act by their instructions."

On the 19th of July, the plaintiff bought the bark of Cooper, upon the terms of his offer of the 15th; and the invoice was left with him by Cooper, who thereupon sent the defendants a telegraphic message, in the following terms:—"Please to transfer the bill of lading belonging to me, to Buchanan & Co."

On the same evening, John Buchanan, who throughout was the plaintiff's agent, was informed by Matton, the agent of the defendants, that he had received Cooper's letter, and his telegraphic message that the "bill of lading" should be transferred to his, Buchanan's, firm. Buchanan, therefore, then learned that there was a bill of lading. He requested that the bark should be sent to Manchester, and the freight paid there: but Matton insisted that it should be paid in Liverpool. Matton then, at Buchanan's request, gave him an order addressed to the captain, as follows:—

"Liverpool, July 19th, 1856.

"To the captain and owners of the Mart, of Perth.

"You will please deliver to the order of Messrs. Buchanan & Co. the cargo of bark per said vessel from Dumfries, they paying all expenses of freight, &c."

*This order was sent the same evening to the plaintiff, with a letter from Buchanan, informing him that the bark would not be delivered without payment of the freight in Liverpool.

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On the same day James Donaldson, one of the vendors, arrived in Liverpool,—for what purpose does not appear.

On Monday, the 21st of July, the plaintiff sent 20*l.* to Buchanan & Co., to pay the freight. On the same day, an interview took place between James Donaldson, Amess (the master of the Mart), and Buchanan, to which and the subsequent payments and delivery of the cargo so much importance is alleged by the plaintiff to belong, that we recite them in the terms of the special case,—premising that Donaldson does not appear to have uttered a word from beginning to end of that interview, that nothing said thereat in his presence was untrue, and that nothing was concluded thereat. This statement in the case is as follows:—

"On Monday, the 21st, after Mr. John Buchanan had received from the plaintiff the 20*l.* and the defendants' order, Mr. James Donaldson and Mr. Amess, the master of the Mart, called together on Mr. John Buchanan. The master asked Mr. John Buchanan to give him a little money on account of the freight. Mr. Buchanan said he was prepared

to pay all the freight. Mr. Buchanan asked the master where the bill of lading was. The master said he did not know where it was, though he had signed one; but that here was the master of the bark, meaning Mr. Donaldson, said that he had passed the bill of lading on to Cooper, and it should have been in their possession by now. Mr. Buchanan said the thing was all right; he had the freight in his pocket. Mr. Buchanan then made an appointment for them to meet him at the defendants' office at half-past two in the afternoon. The master *accordingly met him at the defendants' office; but Mr. Donaldson did not accompany him. The master produced the following order:— [*645

"'Corsock, 12th July, 1856.

"'The New Quay Company, carriers to Manchester, on behalf of Mr. Isaac Cooper.

"'Gentlemen,—Please to pay Mr. John Amess the sum of 20*l.* sterling in full of freight of bark per ship Mart.

"'Per pro. JAMES DONALDSON,
"'JAMES M'PHERSON.'

"Mr. Buchanan paid the master the 20*l.* for the freight, and the following receipt was written across the last-mentioned order, and signed by the master, and a receipt-stamp affixed to it,—'Received from Messrs. Buchanan & Co. the sum of 20*l.* as freight (on the bark) per sloop Mart of Perth.' Mr. Buchanan then showed Mr. Matton the last-mentioned order and receipt, and asked Mr. Matton if he could take the bark up for Mr. Sheridan to Manchester, and stow it for him there. Mr. Matton told him he could. Mr. Buchanan then wrote the following directions across the defendants' order of the 19th of July,—'The New Quay Company will please to forward the cargo of bark per Mart, of Perth, to Manchester, and there to warehouse it for Mr. John B. Sheridan, 34, Cannon St., Manchester, or his order; and please to pay the charges thereon, the freight being paid here, on his account, by us, and oblige Buchanan & Co.' And Mr. Buchanan left that order with Mr. Matton. On the 22d of July, the plaintiff, at Cooper's request, paid Cooper 21*l.*, and took from him a receipt for 41*l.* as paid on account of freight and expenses of oak-bark. The plaintiff had not heard that there was any dispute about the bark at the time he paid the 41*l.* On the 23d of July, about two-thirds of the bark was removed from the Mart into one of the defendants' boats to be taken to Manchester."

*Afterwards, upon the same day, the master appears to have taken alarm, and finding, upon inquiry of Matton, that the bill of lading had not come to hand, he demanded a return of the bark, and at first refused to deliver the residue. Matton, however, induced him to deliver the residue of the bark, and permit them to carry the whole to Manchester, subject to his order. This arrangement was expressed in the following letter, to which Matton assented:— [*646

"Liverpool, 23d July, 1856.

"Mr. Joseph Matton, agent for the New Quay Company.

"Sir,—I request that you will not deliver the cargo of bark received by you this day from the sloop Mart, until the bill of lading signed by me for the same is produced by the party applying for the said bark on its arrival at Manchester.

(Signed) "JOHN AMESS."

On the same day, Matton informed Cooper of that arrangement.

On the 24th of July, upon receiving back the unaccepted draft and the bill of lading, Messrs. Donaldson telegraphed to Liverpool to stop the bark; and on that day the plaintiff learned that it had been stopped, and that the defendants would not deliver it, on the ground of the ownership being disputed.

A correspondence took place, the result of which was, that the defendants refused to deliver the bark to the plaintiff; and, on the 29th of July, by Donaldsons' directions, they delivered it to Middleton, a purchaser from Donaldsons. They at the same time delivered to Middleton a debit note made out to the plaintiff as debtor, for the carriage of the bark from Liverpool to Manchester, 14*l.* 16*s.* Middleton was required to pay that sum before he removed the goods, and got a receipt upon the debit note.

*647] *The above statement contains all the material facts. We have thought it necessary to preface our judgment with that statement, because, when the facts are stated clearly, it will be clear what the judgment ought to be.

The first question arising upon the facts, is, whose were the goods when the defendants refused to deliver them to the plaintiff? They were Donaldsons' when they were shipped, and they were to become Cooper's upon his paying for them and obtaining the bill of lading. This he never did; nor did he in any way acquire a right to the possession of the goods: consequently, Sheridan acquired no right by the purchase from Cooper. But it was argued that he did acquire such a right by the conduct of James Donaldson on the 21st of July, at the interview in Liverpool, and by the subsequent payments made by the plaintiff in consequence of such conduct. An attentive consideration of the facts will, however, negative this.

Upon the 19th of July, Buchanan knew that there was a bill of lading. Donaldson does not appear to have known anything of the plaintiff, or that there was a purchaser from Cooper. The plaintiff's name had not previously been mentioned. Donaldson said nothing at the interview; and all that the master, who, by the bye, was not Donaldson's agent, said that Donaldson had said, was true, namely, that he had passed the bill of lading on to Cooper, and it should have been in their possession by now. This was a statement of the master made in answer to Buchanan's question where the bill of lading was, and it was doubtless made to induce Buchanan to pay upon the supposition that the bill of lading was in Cooper's hands; but every word of it was true. Buchanan's answer, that "the thing was all right; he had the freight in his pocket," —if sincere, shows that both parties were honestly mistaken in supposing

*648] that *Cooper probably had the bill of lading, and further shows that Buchanan was inclined to act upon his belief of the fact. He clearly did not act upon what then passed, or say he would; for, if he did, he would then and there have paid the captain the freight. If he had done so, it would, in our opinion, have made no difference: but he did not. In fact, no arrangement was then come to, but Buchanan made an appointment for Donaldson and the master to meet him at the defendants' office at half-past two in the afternoon. Donaldson did not attend that appointment, and appears to have taken no further part. The master and Buchanan did attend; and the master produced the

order already observed upon, of the 12th of July (given when the bill of lading was signed), and Buchanan thereupon paid him the freight, without any further inquiry or communication from Donaldson. The production of this document and the payment made upon it, were strongly insisted upon by Mr. *Mellish*, in his very able argument, as, taken in connection with the interview already spoken of, constituting a distinct and independent authority from Donaldson to the plaintiff to take possession of the goods as buyer. The case seems ingeniously framed to make this view plausible. The date of that document, however, its address, and the fact that it was not referred to at the interview of the 21st, show that it had acquired no new force when it was used. It was simply an authority given to the master, when he signed the bill of lading, requesting the defendants to do what is common among carriers on distinct parts of a route, namely, to pay the master his freight, upon receiving the goods; and it was of course given in the expectation that the defendants would be furnished by the buyer with the bill of lading, and that he would pay them the entire freight, including what they had paid the master of the vessel, *upon the delivery of the goods [*649
at Manchester. We cannot, therefore, think that Donaldsons' silence whilst the master told the truth at the interview where nothing was concluded, coupled with his not attending a further appointment, and with the master (who was not his agent) using a document made nine days before, and not alluded to at the interview, for the purpose of obtaining payment, from a person to whom it was not directed, of freight which the defendant had requested another, and not the plaintiff, to pay, can give such person, or his principal, a right, by any known mode of transfer, to the possession of the goods in respect of which the freight was due. It is, therefore, clear to demonstration that the goods remained Donaldsons', and never did belong to the plaintiff.

The only remaining question is, whether the defendants, being employed by the plaintiff as common carriers, are thereby precluded from disputing his title to the goods. We rather doubt whether this question arises upon the first count, because there was no delivery by the plaintiff to the defendants of the whole of the bark, and no contract for the carriage of less; and upon this ground, as at present advised, we should decide that the verdict ought to be for the defendants upon the first plea to the first count.

The count in trover remains to be considered; and, as the third plea to the first count, striking out as surplusage the part imputing fraud to the plaintiff, or with a slight amendment, also raises the same question, it is necessary to discuss it.

Assuming it to arise, we are of opinion that there is no estoppel. The defendants were common carriers, and therefore bound to receive the goods for carriage. They could make no inquiry as to the ownership. They have not voluntarily raised the question; it was raised by the demand of the real owner, before the defendants *had parted [*650
with the goods. The law would have protected them against the real owner, if they had delivered the good in pursuance of their employment, without notice of his claim. It ought equally to protect them against the pseudo owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods, and their being given up to him. The compulsory character of the

employment of a carrier furnishes ample ground for so holding: and we do not assent to the altered statement of the law in the later editions of Story on Bailments, §§ 266 and 582,—the earlier editions of that valuable work having laid it down in accordance with our view.(a)

For these reasons, we give judgment for the defendants.

Judgment for the defendants.

(a) In the 2d edition of Story on Bailments (published in 1839), the learned author, speaking of excuses of carriers for the non-delivery of goods, says, § 582,—"Another excuse is, when the goods are demanded or taken from the possession of the carrier by some person having a superior title to the property. It is generally true that the carrier cannot dispute the title of the person who delivers the goods to him, or set up an adverse title, to defeat his right of action growing out of the contract (Anonymous, cited 3 Esp. N. P. C. 115). But this is true only when that adverse claim is not asserted by the superior claimant himself, but merely by the carrier, of his own motion. Where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and, if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods (Taylor v. Plumer, 3 M. & Selw. 562; Wilson v. Anderton, 1 B. & Ad. 450 (E. C. L. R. vol. 20))."

In the corresponding section of the edition of 1856 (which was referred to by the learned judge in his judgment), the law is thus stated,—"Another excuse which may be asserted, under
*651] certain circumstances, is, when the goods are demanded or taken from the possession of *the carrier by some person having a superior title to the property. In general the carrier is not permitted to dispute the title of the person who delivers the goods to him, or to set up an adverse title to defeat his right of action growing out of his contract (citing 3 Esp. N. P. C. 115, but giving the name of the principal case, which has nothing to do with the question; and also referring to Kieran v. Sandars, 6 Ad. & E. 515 (E. C. L. R. vol. 33), Nickolson v. Knowles, 5 Madd. 47, Story on Agency, § 217, Story on Eq. Jur. §§ 814—817, and Story on Bailments, §§ 264, 450). And this is emphatically the rule when the adverse claim is not asserted by the superior claimant himself, but is merely asserted by the carrier of his own mere motion (Story on Agency, § 217; 2 Story on Eq. Jur. §§ 816, 817; Story on Bailments, § 450). *Formerly it seems to have been thought, that, if the adverse title was asserted by the superior claimant, and the carrier had due notice of it, and was forbidden to deliver it to the bailor, he might protect himself from responsibility, and set up such title against the bailor* (Ogle v. Atkinson, 5 Taunt. 759 (E. C. L. R. vol. 1), 1 Marsh. 323 (E. C. L. R. vol. 4); Story on Bailments, § 450). *But this doctrine, although perhaps maintainable in some cases under special circumstances, is now deemed to be generally untenable* (Story on Bailments, § 266); *and therefore the carrier may be placed in a position in which he cannot safely deliver the goods to either party.* For, where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and, if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods by the person setting up such adverse title (Taylor v. Plummer, 3 M. & Selw. 562; Wilson v. Anderton, 1 B. & Ad. 450; 2 Story on Eq. Jur. §§ 816, 817; Story on Bailments, §§ 266, 450; Story on Agency, § 217),"—a result which is plainly unjust.

The 266th section, which is above referred to as the authority for the supposed change in the law, is as follows:—"Even if the lender is not the owner of the thing, the borrower must ordinarily restore it to him, and has no right to set up the title of a mere stranger against him; for, the lender has, by his contract, a right to be reinstated in his possession (Pothier, Prêt à Usage, n. 18, 46; Story on Bailments, § 230). However, if, in the mean time, a recovery has been had against the borrower without his default (Edson v. Weston, 7 Cowen, R. 278; Wilson v. Ander-
*652] ton, 1 B. & Ad. 450 (E. C. L. R. vol. 20); Story on Bailments, *§ 120), or if the thing has been attached in his hand in an adverse suit, that will constitute a sufficient excuse (Pothier, Prêt à Usage, n. 46; Story on Bailments, § 120). If the borrower actually restores the thing to the true and real owner, without any injury or injustice to the lender, he will no longer be liable to any action (Whittier v. Smith, 11 Mass. R. 210). In like manner, if the thing is taken out of the possession of the borrower by the real owner (Shelbury v. Scotford, Yelv. 22), or if, upon a threat by such owner to sue him, he has delivered up the thing, he will be discharged (Wilson v. Anderton, 1 B. & Ad. 450, per Littledale, J)."

The passage printed above in italics appears to have been written by the learned author himself; for it is to be found in the 3d edition, which was published at Boston in 1843,—two years before Dr. Story's decease, which took place on the 10th of September, 1845: see his Life and Letters, edited by his son, Vol. 2, p. 548,—and which edition purports to have been revised and corrected by himself. The passage is repeated in the edition of 1846, by the son of the learned judge, and also in Mr. Sumner's edition of 1851, and in Mr. Bennett's edition of 1856.

The law as thus stated in the later editions of Story, is adopted by Mr. Angell in his treatise on the Law of Carriers, § 335. But that learned author adds something which, if the law were

as he states it, would be equally erroneous. He says: "But the situation of the bailee is not one without remedy. He is not bound to ascertain who has the right, and he may file a bill of interpleader in a court of equity. If the bailee forbears to adopt that mode of proceeding, and makes himself a party, by retaining the goods for the bailor, he must stand or fall by his title." This, if the previous statement were correct, would be opposed to the established doctrine in equity, that a party cannot file a bill of interpleader in contradiction to the contract which he has entered into: Crawshay *v.* Thornton, 7 Sim. 391, 2 Mylne & Cr. 1.

Cheesman *v.* Exall, 6 Exch. 341,† is somewhat analogous to the principal case, with reference to a pledge. And the general question was argued in a still more recent case of Thorne *v.* Tilbury, 3 Hurlst. & N. 534,† but the court thought that the plea did not raise the point so as to render it necessary to decide upon the conflict of authority which had been referred to. In Dixon *v.* Yates, 5 B. & Ad. 340 (E. C. L. R. vol. 27), Lord Wensleydale said,—"The defendant is a warehouseman, and *therefore* may set up the jus tertii."

In respect to the right of a bailee to set up the *jus tertii*, see King *v.* Richards, 6 Wharton 418; Floyd *v.* Bovard, 6 Watts & Serg. 76; Bates *v.* Stanton, 1 Duer 79; Beach *v.* Bardell, 2 Id. 327; Starker *v.* Dement, 9 Gill 7; Lowrence *v.* Berry, 19 Alabama 130; 1 Parsons on Contr. 679; note to Armory *v.* Delamirie, 1 Smith's Lead. Cases, 5th Am. Ed., 480.

Whether a common carrier, on whom a claim is made by a third person as the real owner of the goods carried, is entitled thereupon to file a bill of interpleader, as suggested by Mr. Angell in the passage quoted in the foregoing note, may perhaps be doubted, as is there done, if the right of the carrier to set up the title of that third person in an action at law, be denied. Yet it hardly seems so clear a case as the learned reporter supposes. The doctrine that no one who by contract or otherwise has voluntarily assumed an independent liability to either of the claimants, can file such a bill, is perfectly settled in England and this country: Sherman *v.* Partridge, 4 Duer 646; Adams *v.* Dixon, 19 Geo. 513; Whitewater Valley Co. *v.* Comegys, 2 Carter, Ind. 469; Gibson *v.* Goldthwaite, 7 Alab. 281; Marvin *v.* Ellwood, 11 Paige 365; but this has always been in cases such as that of landlord and tenant, consignor and consignee, principal and agent, executor and legatee, in which by reason of the relation of the parties, a peculiar duty has arisen, with which the court cannot and ought not to interfere, for the mere convenience of the complainant. On the other hand, the obstacle to the interposition of the *jus tertii* in a suit at law is occasioned rather by the technical doctrine of estoppel, than by considerations which would influence a court of equity, though the one may to a great degree coincide with the other. Now the case of a common carrier would seem to lie outside of this line of coincidence. Being bound to carry all goods offered to him, he can hardly be said to assume any voluntary liability to the bailor, such as to preclude him from the consideration of a court of equity; and as the law casts this duty to receive upon him, it seems but just that he should be relieved from those of its onerous consequences, against which had he been acting freely he might have protected himself. Yet in a court of law he may be as much estopped by his contract, as any ordinary bailee. As a mere matter of common sense, whether the carrier be entitled or not to set up the *jus tertii*, his peculiar position is such as to render it almost impossible for him, with reference to his general duty to deliver forthwith, to make the necessary inquiries in order to satisfy himself of the real state of the title. From this point of view, then, the interposition of a court of equity would seem to be reasonable; and in the absence of any express decision on the point, there is room for a strong argument in its favour.

*653] *WHILEY and Another v. WHILEY. *June* 8.

Where judgment has been signed (for default of appearance) upon a writ specially endorsed under the 25th section of the Common Law Procedure Act, 1852,—the affidavit in support of an application by the defendant to be let in to defend, under the proviso in s. 27, must not merely state that he has "a defence upon the merits," but must *disclose* or *make known* the nature of such defence, in order that the judge may see that it really amounts to a defence.

THE 25th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, authorizes a special endorsement of the particulars of the plaintiff's claim, where it is for a debt or liquidated demand in money, to be endorsed on the writ of summons; and the 27th section enacts, that, "in case of non-appearance by the defendant, where the writ of summons is endorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this act [s. 22], and a copy of the writ of summons, at once to sign final judgment in the form contained in the schedule (A) to this act annexed, marked No. 5 (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, &c.; and the plaintiff may upon such judgment issue execution at the expiration of eight days from the last day for appearance, and not before: *provided always that it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend, upon an application supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits.*"

The defendant was served with a writ of summons specially endorsed as follows:—"September, 1857. To amount received by the defendant for the use of the plaintiffs on account of the price and value of the brig Isabella, the property of the plaintiffs, 936*l.* 18*s.* 4*d.*"

*654] *On the 18th of April last final judgment was signed against the defendant for non-appearance, and application was made to Crowder, J., at Chambers, to set aside that judgment and to let the defendant in to defend under the proviso at the end of the 27th section. The affidavit (of the defendant) upon which that application was founded was as follows:—"This action is brought against me to recover the sum alleged to be due to the plaintiffs as mortgagees of the ship Isabella. I was not a party to the said mortgage, nor derived any benefit therefrom, and the debt was contracted and the money borrowed by my co-owner on the same ship before I became an owner or interested therein. I instructed my solicitor, Mr. J. S. of M., to defend this action and to protect my interest; but he has neglected to do so, owing, I believe, to pecuniary embarrassments, and he has since, as I believe, left the town of M., where he was practising as an attorney and solicitor. In consequence of the neglect of the said J. S., judgment was signed against me on the 18th of April last. I have a good defence to this action on the merits, and I am desirous of being allowed to defend the same, as I am not indebted to the plaintiffs, either legally or morally, in one penny."

Upon this affidavit, and upon the authority of a case of Warrington v. Leake, 11 Exch. 304,† the learned judge made the order as prayed.

Field, on a former day in this term, obtained a rule nisi to rescind that order. He submitted that the affidavit did not within the meaning of the proviso in s. 27 "disclose" any defence upon the merits.

H. James now showed cause.—This matter was very fully discussed in the Court of Exchequer in the recent case of Warrington *v.* Leake, 11 Exch. 304,† where *that court decided (Martin, B., dissenting) [*655 that an affidavit stating the precise nature of the defence is not requisite, but that the ordinary affidavit of merits is sufficient: and that is manifestly the convenient course, for no affidavit can be received in answer: Blewitt *v.* Gordon, 1 Dowl. N. S. 815: and any other decision would have the effect of introducing a new sort of affidavit of merits. In Warrington *v.* Leake, Pollock, C. B., says: "The 27th section enables a plaintiff to sign judgment in case of the non-appearance of the defendant, although personal service of the writ of summons has not been effected,—the effect of which may be that persons, through some mistake on their part, may find themselves suddenly encumbered with a judgment signed against them, of which they know absolutely nothing, or at least of which they have not received such notice as used formerly to be required, under the old practice, before a plaintiff was entitled to sign judgment. This proviso was intended for the purpose of guarding against such mischief. Now, the word 'disclosing,' if the proper sources are sought to obtain its true definition, apparently points to something more than 'adverting to,' or 'stating,' or simply 'telling,' which are some of its definitions. It was probably intended that something more was meant, but of that I am by no means certain. The legislature has made use of a word which does not necessarily convey more than the sense of 'telling;' and, as this uncertainty exists, I think we ought to take care how we permit a defendant to be bound by a judgment signed against him in a case such as the present, in a mode of procedure which, but for this enactment, would not be permitted by the law of the land." Parke, B., with less hesitation, says: "I think the proviso only requires an affidavit satisfactorily accounting for the non-appearance, and the ordinary affidavit of merits. *I think the sentence is not perfectly complete as it stands, but that it was so framed for the [*656 sake of brevity and simplicity. When the matter was before me, I could not see why more should be required than the ordinary affidavit of merits under the old practice, where the defendant had appeared and had taken several steps in the action, and judgment had been snapped against him. I therefore think the mere affidavit of merits is sufficient, without stating the ground of defence, as used to be the case under the old practice of letting in a defendant to defend, upon a simple affidavit." And Platt, B., adds: "In my opinion the 27th section has not altered the practice with respect to the affidavit, by requiring more from a defendant than used to be required. I have had this question frequently before me at Chambers, and I have come to the conclusion, that, by 'disclosing' is meant averring a good defence on the merits. This is the only condition to which a defendant is subjected on an application to set aside a judgment, for, the act does not proceed to state that such affidavit may be answered by an affidavit made on the part of the plaintiff." [WILLIAMS, J.—The affidavit here assigns a bad reason for the defendant's alleged non-liability.] Independently of that, the affidavit, it is submitted, sufficiently discloses that the defendant has a defence

upon the merits. Is the defendant to go fully into his defence upon affidavit? That surely never could have been intended. [COCKBURN, C. J.—The legislature must certainly have meant, when it used the word "disclosing," something more than a mere statement of the fact that the defendant has a defence upon the merits.] There can be no more reason for the affidavit entering into a detail of the nature of the defence now than there was under the old practice where it was sought to set aside a judgment signed for want of a plea.

*657] *Field*, in support of his rule.—Before the passing of the Common Law Procedure Act, 1852, the practice undoubtedly was, to let in a defendant against whom judgment had been signed for want of a plea, to defend, upon a simple affidavit stating that he had a good defence to the action upon the merits. But at that time there could be no endorsement showing the nature of the claim, as now. [WILLIAMS, J.—That would appear from the declaration.] By the special endorsement on the writ of summons, the plaintiff gives the defendant notice of what it is that he is suing him for; and for so doing he obtains a statutory benefit from which he can only be removed by the defendant's compliance with the requirements of the proviso at the end of s. 27, viz. by producing an affidavit satisfactorily accounting for the non-appearance, and disclosing a defence upon the merits. The affidavit produced upon the present occasion clearly does not disclose a defence upon the merits. Stating merely "I have a good defence to this action on the merits" certainly *discloses* nothing. It is submitted that the interpretation put upon this proviso by Martin, B., in Warrington *v.* Leake, is the more reasonable one, and ought to prevail. He says,—"The word 'disclosing' is not uselessly employed by the legislature, but is a very apt and appropriate term, and ought to have that force attributed to it which it properly bears. Knowing, as I do, what the nature of the affidavit was which went by the name of 'an affidavit of merits' under the old practice, and finding that the new law requires the affidavit of merits to 'disclose the defence,' I come to the conclusion that something more is now required than the ordinary affidavit of merits." Some assistance in construing this proviso may be derived from the 2d section of the Bills of Exchange Act, 18 & 19 Vict. c. 67, which likewise uses

*658] the word "disclose." The 1st *section having provided for the service of the writ, the 2d proceeds to enact that "a judge of any of the said courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum endorsed on the writ, or upon affidavits satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit." Under that statute, the affidavit invariably sets out the facts upon which the proposed defence rests. [BYLES, J.—The additional words used there show plainly what the legislature meant by the word "disclose." There is an ambiguity in the proviso in s. 27 of the Common Law Procedure Act, 1852.] If the legislature had intended that the defendant should be let in to defend upon a dry affidavit of merits, they would have said so. [COCKBURN, C. J.—What "disclosure" does the defendant make when he says,

"I have a defence to the action upon the merits: at some future time I will tell you what it is."] The disclosure clearly should be such as to enable the judge to determine whether or not it is fit that the defendant should be let in to make the defence.

COCKBURN, C. J.—I am of opinion that the rule to set aside the order of my Brother Crowder should be made absolute. The language used by the legislature with reference to these liquidated demands to be endorsed on the writ of summons, is, that, in case of non-appearance by the defendant, it shall be lawful for the plaintiff, on filing an affidavit of personal service of the writ, &c., at once to sign final judgment, upon which *judgment-execution may issue at the expiration of eight [*659
days from the last day for appearance,—with this proviso, that "it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend, upon an application supported by *satisfactory* affidavits accounting for the non-appearance, and *disclosing a defence upon the merits.*" It has been contended by Mr. *James* (who has urged all that could be said upon the subject) that this means no more than "*stating* that he has a defence upon the merits;" and that view is supported by the decision of the majority of the Court of Exchequer in Warrington *v.* Leake, 11 Exch. 304.† I feel bound, however, to say that I concur in the opinion expressed by Martin, B. I think it is impossible to say that disclosing a defence means no more than stating the fact of the existence of a defence. It clearly means something more: the defendant must show upon his affidavit what the nature of the defence is. He need not set out the whole defence with minute particularity: but he must do something more than nakedly state that he has a defence to the action upon the merits. Much was said in Warrington *v.* Leake, and the argument has been again urged before us, as to the hardship which would be thus imposed upon defendants,—a hardship which the law does not impose upon them in other cases where judgment has been signed in consequence of a slip. These arguments, however, only tend to show that possibly the legislature would have done more wisely if they had put these upon the same footing as other cases: but they afford no ground for calling upon us to put a different construction upon the language of the legislature from that which we should otherwise have done. Considerable light is thrown upon the meaning of the proviso in question by the 2d section of the Bills of Exchange Act, 1855, where a similar expression is *used; [*660
and yet nobody has ever thought it sufficient for an affidavit to found an application for leave to defend merely to state that the defendant has a legal or equitable defence. "Disclosing" there manifestly points to something more than a mere statement of the existence of a defence. Independently of that statute, I should have felt no difficulty in coming to the conclusion I have stated: but, with it, all possibility of doubt is in my judgment removed. For these reasons, I am of opinion that the order must be set aside. At the same time, as it is not impossible that the defendant may have been misled by the decision of the Court of Exchequer in Warrington *v.* Leake, it seems to me that it would be unjust that he should be precluded from setting up a defence upon the merits, if he has one. I therefore think he ought to be allowed to renew his application, upon an amended affidavit, within a reasonable time.

WILLIAMS, J.—I am of the same opinion. It is our duty simply to construe the language of the statute, not to canvass the propriety of its enactments. It appears from the case of Warrington *v.* Leake that some persons for whose judgment and learning I entertain the most sincere respect, have considered that the proviso in question, if construed literally, would be productive of a harsh and inconvenient change in the practice of the law. It is said, that, as before the passing of the Common Law Procedure Act, where judgment had been signed for want of a plea, it was only necessary for the defendant on applying to set aside the judgment to produce an affidavit accounting for the slip and swearing generally to merits, so now there can be no good reason for imposing upon a defendant who seeks to be let in to defend after a judgment signed against him for non-appearance under *this act, any more strict terms. I do not think it necessary to give any opinion as to whether the legislature have been considerate or not in altering the law in this respect: that is not a legitimate mode of construing an act of parliament. Where the language of an act of parliament will admit of two constructions, if one of them would lead to harshness or injustice, we may fairly infer that the other will give effect to the intention of the legislature, and adopt it in preference. That is the only legitimate use we can make of such considerations. Here, however, assuming that the requisitions of the clause in question are somewhat harsh,—it must be observed that it is confined to debts and liquidated demands in money,—will that justify the court in holding that "disclosing a defence upon the merits" means simply swearing that the defendant has a defence upon the merits? It seems to me that that would be doing the greatest violence to the words of the act, and that it is not enough for the defendant to swear that he has merits, but that he must disclose to the judge by affidavit what that defence is. How can that be said to be a "satisfactory affidavit" which conveys no information whatever to the mind of the judge? The Bills of Exchange Act, which is in pari materiâ, affords us considerable light in arriving at this conclusion. Upon the whole, therefore, notwithstanding the decision of the Court of Exchequer, and giving full consideration to the reasoning of the learned judges who pronounced it, I have no hesitation in saying that this affidavit is not such as the statute requires.

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WILLES, J.—I am of the same opinion; and I am not deterred from being so by the fact of the former practice upon this subject having been as represented, because the matter upon which we are now passing judgment is an entirely new one, and is the creature of the *Common Law Procedure Act, under which the suing party has great privileges given to him. The 25th and 27th sections have reference solely to debts and claims for a liquidated demand in money, cases in which there is more rarely a defence than in other forms of action. In those cases, therefore, the legislature has thought proper, looking to the comparatively small number of cases in which the defendant has any defence, to give the plaintiff a more speedy judgment than he had by the old course of practice. By the 25th section the plaintiff in such cases is allowed to make upon the writ of summons a special endorsement of the particulars of his claim, which endorsement is to stand for particulars of demand. And by s. 27, in case the defendant fails to appear to a writ so specially endorsed, the plaintiff may, on filing an affidavit of

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personal service, or a judge's order for leave to proceed under another provision in the act, at once sign final judgment, without being put to the expense and delay of filing or delivering a declaration. The provision that no proceeding in error shall lie upon a judgment so signed, shows that it was intended to give the plaintiff an advantage which he did not possess before. The judgment is to be final, and not reversable in a court of error. Then comes a provision which is very peculiar, and which really is for the benefit of the plaintiff:—"and the plaintiff may upon such judgment issue execution at the expiration of eight days from the last day for appearance, and not before." As to that, the provision has been held to be so entirely the creature of the statute, that, although in the ordinary computation of time, where the last day is Sunday, the following day is given, in this particular instance the Sunday reckons as one of the eight days, though the last.(a) *Then comes the proviso upon which this question turns, and which was manifestly [*663 introduced for the purpose of saving useless expense to both parties:—"Provided always that it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend, upon an application supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits." The 33d section introduces a further benefit for a plaintiff suing upon such a cause of action: where two or more defendants are sued, and one only appears, the plaintiff may sign judgment against the defendant who has not appeared, and issue execution at once. It appears to me, therefore, that, seeing that this is entirely a new proceeding, we must interpret the clause without reference to any former practice. So regarding it, it seems to me that "disclosing" must be construed to mean what the obvious and natural sense would seem to indicate,—opening out and letting the judge see whether there really is a defence upon the merits. I have no doubt whatever that it was the intention of the legislature that it should be so. I entirely agree also in the suggestion of my Lord, that, inasmuch as the defendant was in all probability misled by the case in the Exchequer, he ought to be allowed an opportunity of applying again upon an amended affidavit.

BYLES, J.—I concur in the judgment pronounced by my Lord and my learned Brothers, though, I must confess, not without some little hesitation: for, I do not think that the decision of the Court of Exchequer in Warrington *v.* Leake did any violence to the language of the 27th section. The proviso in that section does not say that there shall be an affidavit disclosing facts from which it may be seen that the defendant has a defence upon the merits, but merely an affidavit *"disclosing a defence upon the merits." At the time of the [*664 passing of the Common Law Procedure Act, 1852, an affidavit of merits was a thing that was very familiarly known. It is said that the consequence of a decision different from that come to by the Court of Exchequer in Warrington *v.* Leake would be, the introduction of a new sort of affidavit of merits. Since that decision was pronounced, the Bills of Exchange Act, in the 2d section of which the same word "disclose" is made use of, certainly does introduce a new description of affidavit of merits. The words of the proviso which we are called upon

(a) See Rowberry *v.* Morgan, 9 Exch. 730.†

to construe being in my judgment equivocal, we have to put the best construction upon them we are able: and it is important that there should be no doubt upon the subject. In order, therefore, that there may be no doubt, so far at least as this court is concerned, I concur in the decision that the present affidavit is insufficient.

Rule absolute.

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*665] *GARDNER, Appellant, WHITFORD, Respondent. *June* 24.

The 63d section of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), which imposes a penalty upon the master of any vessel who shall without the permission of the harbour-master moor the same in the entrance (or within the prescribed limits) of any dock or harbour, and who shall not remove the same upon notice, overrides and extinguishes all local and private rights of property therein.

The assertion of such local or private rights does not exclude the jurisdiction of the justices under the act.

Upon appeals under the 19 & 20 Vict. c. 43, the appellant begins in this court, though it is otherwise in the Queen's Bench and Exchequer.

An information was laid on the 8th of February, 1858, by John Whitford, the harbour-master at the Great Grimsby Docks, in the borough of Grimsby, before John Wintringham, Esq., one of Her Majesty's justices of the peace for the borough, for that, on the 1st of February, 1858, at the parish of Great Grimsby, in the said borough of Grimsby, the said John Gardner, then and there being the master of a certain vessel, to wit, the packet called "The Pelham," did place the said vessel in the entrance of the old dock there situate, the property of the Manchester, Sheffield, and Lincolnshire Railway Company, without the permission of the said John Whitford, the harbour-master of the said dock, and did not, on being required so to do by the said harbour-master, forthwith proceed to remove the said vessel, contrary to the provisions of the 63d section of the Harbours, Docks, and Piers Clauses Act, 1847, which said Harbours, Docks, and Piers Clauses Act, 1847, is incorporated with The Manchester, Sheffield, and Lincolnshire Railway Act, 1849: that the said information and complaint was, on the 15th of February, 1858, heard at the Town Hall in Great Grimsby by and before the undersigned, J. Wintringham and C. B. Moody, Esquires, two of Her Majesty's justices of the peace acting in and for the said borough of Grimsby, and the said John Whitford, and J. G., the solicitor of the Manchester, Sheffield, and Lincolnshire Railway Company, appeared in support of the said information, and the said John Gardner, the appellant, and W. P., the solicitor for the said Packet Company, appeared for the defence; and the following evidence was offered and received in support of the said
*666] information, *viz.*, The Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27, s. 63, whereby it is enacted "that, as soon as the harbour or dock shall be so far completed as to admit vessels to enter therein, no vessel, except with the permission of the harbour-master, shall lie or be moored in the entrance of the harbour or dock, or within the prescribed limits; and, if the master of any vessel either place it or suffer it to remain in the entrance of the harbour or dock, or within the prescribed limits, without such permission, and do not, on

being required so to do by the harbour-master, forthwith proceed to remove such vessel, he shall be liable to a penalty not exceeding 5*l.*, and a further sum of 20*s* for every hour that such vessel shall remain within the limits aforesaid after a reasonable time for removing the same has expired after such requisition: Also the 9 & 10 Vict. c. cclxviii. (local and personal), by which The Grimsby Dock Company and certain railway companies therein named were incorporated, by the name of "The Manchester, Sheffield, and Lincolnshire Railway Company:" Also the 12 & 13 Vict. c. lxxxi. (local and personal), ss. 6, 10, and 241; which section 6 incorporates with that act the provisions of The Companies Clauses Consolidation Act, 1845, the Railways Clauses Consolidation Act, 1845, and the said Harbours, Docks, and Piers Clauses Act, 1847; and section 10, the interpretation clause, defines the word "dock or docks" to mean and include "the Grimsby Docks, and the outfalls, entrances, wharfs, &c., thereof;" and section 241 enacts, that, with respect to Grimsby Docks, the prescribed limits within which no vessel except with the permission of the dock-master shall lie or be moored, and within which all the powers conferred upon the dock-master by the Harbours, Docks, and Piers Clauses Act, 1847, for the removal of such vessels or otherwise in relation to *vessels lying or being [*667 within the prescribed limits, shall be the distance of two hundred yards from the said docks: Also the 39 G. 3, c. lxx. (local and personal), s. 40, which enacted "that no ship, vessel, lighter, raft, boat, or other light or small craft, should at any time or times be permitted or suffered to lie or be moored within any part of the haven lying between the lock erected and fixed therein and the river Humber, without the express license and consent of the haven or harbour-master for the time being:" Also the 8 & 9 Vict. c. ccii. (local and personal), intituled "The Grimsby Docks Act, 1845," by which the above act of 39 G. 3 was repealed; and, by s. 84 of the said Grimsby Docks Act, 1845, it is enacted, "that no vessel, except with the permission of the dock-master, shall lie or be moored in any of the outfalls or entrances, or within two hundred yards from the centre of any entrance, of the said docks, or of any outfalls into the river Humber, unless for the purpose of coming in or going out of the said docks, so that at all times the entrances may be kept clear and without obstruction."

The appointment of the said John Whitford as harbour-master, under the seal of the said Manchester, Sheffield, and Lincolnshire Railway Company, was also produced and received in evidence; and a notice, of which the following is a copy, was proved to have been personally served by the said John Whitford, on the 15th of January last, on the said John Gardner, the defendant and appellant, the master of the said vessel called "The Pelham" steam-packet.

"To John Gardner, the master of the steam-packet or vessel called "The Pelham."

"I, the undersigned John Whitford, of Great Grimsby, in the county of Lincoln, the harbour-master of and for the undertaking called the 'Grimsby Docks,' duly appointed by the Manchester, Sheffield, and Lincolnshire *Railway Company, do hereby give you notice, [*668 that, if, at any time after the 30th day of January, you shall moor or place, or suffer your vessel called the 'Pelham,' or any other vessel of which you are the master, to lie in the entrance of the said

docks called the Grimsby Docks, or either of the said docks, or within the prescribed limits thereof, without my permission (and which permission I hereby refuse to give you), I shall for each and every time you shall so moor or place your said vessel in the said entrance of the said docks, or either of them, or within the prescribed limits thereof, proceed to recover from you the penalty or penalties imposed by the 'Harbours, Docks, and Piers Clauses Act, 1847, according to law. Given under my hand, this 15th day of January, 1858. JOHN WHITFORD, "Harbour-Master.'

Evidence was also given, that, on Monday, the 1st of February, 1858, being after the expiration of the day named in the said notice, the said John Whitford, as such harbour-master, personally required the said John Gardner, the said defendant and appellant, at or about ten o'clock in the morning of that day, to remove the said vessel called "The Pelham" packet; the said John Gardner, the defendant and appellant, being then on board the said vessel called "The Pelham" packet, which had been and was then moored at the old packet landing called the jetty, in Great Grimsby, in the said borough, in the channel or entrance from and to the river Humber to and from the said Grimsby Old Dock, about fifty or sixty yards from the said old dock gates, being within the prescribed limits, and through which channel or entrance every ship or vessel going into or coming out of the said Grimsby Old Dock would
*669] have to pass, there being at the time the said John *Whitford, the said harbour-master, required the said John Gardner, the said defendant and appellant, to remove the said vessel called "The Pelham" packet, sufficient water to enable the said John Gardner, the said defendant and appellant, to have removed the said vessel called "The Pelham" packet; but the said John Gardner, the said defendant and appellant, refused to comply with such order of the said John Whitford, the said harbour-master, but kept the said vessel called "The Pelham" packet moored in the same situation, varying only with the fall and rise of the tide, until four or five o'clock in the afternoon of the same day: That no vessel wanted to pass in or from the said Grimsby Old Dock at the time the said John Whitford, the said harbour-master, required the said John Gardner, the said defendant and appellant, to remove the said vessel called "The Pelham" packet: That no evidence was produced on behalf of the said John Gardner, the said defendant and appellant: but the conviction of the said John Gardner, the said defendant and appellant, was opposed on the following grounds,—

1st, That the mayor, aldermen, and burgesses of the borough of Grimsby previously to the passing of the first Grimsby Haven Act, 36 G. 3, c. xcviii. (local and personal), had the right of passing from the port of Grimsby to the port of Hull with vessels and otherwise; and that, under the powers and provisions of the said Grimsby Haven Act, 39 G. 3, c. lxx., the mayor and burgesses of Grimsby conveyed by a certain indenture, bearing date the 4th of September, 1804, to the Grimsby Haven Company, in fee, land near the outfall or entrance channel from the river Humber to the Grimsby Old Dock; and that the Grimsby Haven Company, by and under an indenture of lease, dated the 23d of May, 1805, demised a portion of the said land, with the
*670] rights and appurtenances thereto belonging, to John *Barkworth and Thomas Dawson for a term of ninety-nine years; and, by

certain assignments and other assurances in the law, the same, together with a warehouse erected thereon, became vested in John Smith and others, the proprietors of "The Pelham" packet, who thus became possessed of all rights that the said mayor and burgesses of the said borough of Grimsby were entitled to in the said outfall, and of passing up and down the same, which constituted a right of property; and, such right of property being in dispute in this case, that the magistrates had no power or jurisdiction to decide on the said information, or on the offence with the commission of which the said John Gardner, the said defendant and appellant, was charged in the said information.

2dly, That, under the provisions of the said Harbours, Docks, and Piers Clauses Act, 1847, by s. 33, coupled with the 10th section of the 12 & 13 Vict. c. lxxxi., intituled "The Manchester, Sheffield, and Lincolnshire Railway Act, 1849," the 6th section of which incorporates therewith the said Harbours, Docks, and Piers Clauses Act, it is enacted, that, upon payment of the rates made payable by that and the special act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers; and that the said 10th section, in the interpretation clause of the Grimsby Dock Act, includes the Grimsby Docks and the haven, basins, outfalls, entrances, locks, quays, wharfs, piers, jetties, drains, improvements, and additions, and other works connected with the said dock; and that, consequently, the said "Pelham" packet was of right moored in the said outfall at the said old packet landing called the jetty, subject to the payment of the rates and dues payable to the said Manchester, Sheffield, and Lincolnshire Railway Company.

*3dly, That, the said John Whitford, the said harbour-master, exercised the powers vested in him without reasonable cause, or in an unreasonable and unfair manner, contrary to the provisions of the 54th section of the said act of 10 & 11 Vict. c. 27. [*671

The magistrates, after receiving such evidence, and hearing the allegations of both parties, convicted the said John Gardner, the said defendant and appellant, of the offence of which he was charged in the said information, and adjudged that the said John Gardner, the said defendant and appellant, for his said offence, should forfeit and pay the sum of 20*s.*, and should also pay to the said John Whitford his costs in this behalf.

The said John Gardner, the said defendant and appellant, being dissatisfied with the said determination as being erroneous in point of law, applied in writing to the justices, within the time required by the 20 & 21 Vict. c. 43, to state and sign a case setting forth the grounds of such their determination, for the opinion thereon of the Court of Common Pleas; and the said John Gardner, the said defendant and appellant, at the time of making such application, having entered into the required recognisance, the justices have hereinbefore set forth the facts, and also hereinafter set forth the grounds of such their determination, that is to say,—

"As to the first objection to the conviction of the said John Gardner, the defendant and appellant, we the undersigned justices decided that neither the said Grimsby Haven Acts, 36 G. 3, c. xcviii., and 39 G. 3, c. lxx., nor the said conveyance, lease, assignment, and assurance, vested

any property, right, or privilege in the owners of the said piece of land and warehouse in the said outfall of the said Grimsby Old Dock, or entrance passage from the river Humber to the Grimsby Old Dock, that
*672] is not possessed by other subjects of the *realm, or that controls, limits, or affects the operation of the 63d section of the said Harbours, Docks, and Piers Clauses Act, 1847, so as aforesaid incorporated with the said Manchester, Sheffield, and Lincolnshire Railway Act, 1849; the said piece of land and the warehouse thereon being separated from the said outfall or entrance into the said Grimsby Old Dock by a carriage-road, and also by the said jetty or pier.

"As to the second objection, we, the undersigned justices, adjudged, that the enactment in the Harbours, Docks, and Piers Clauses Act, 1847, s. 33, that, upon payment of the rates made payable by that and the special act, and subject to the other provisions thereof, the harbour, dock, and pier should be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers, did not abridge or affect the operation of the said 63d section of the same act.

"And, as to the third objection, we decided that no evidence was given before us, the said magistrates, that the said John Whitford, the said harbour-master, exercised the power vested in him by the said 63d section of the said Harbours, Docks, and Piers Clauses Act, 1847, without reasonable cause, or in an unreasonable and unfair manner, as provided against by the 54th section of the same Harbours, Docks, and Piers Clauses Act, 1847."

Upon the case being called on, *Boden*, who appeared for the respondent, claimed to begin. He stated, that the Court of Queen's Bench had decided, in accordance with the practice on cases from the sessions and cases of mandamus, that, in appeals under the 20 & 21 Vict. c. 43, the party who supported the decision of the justices should be first heard; and that the Court of Exchequer had adopted the same course. But the court said they would adhere to the practice prevailing here in appeals from revising barristers and from county courts, of allowing the appellant to begin.

*673] **Hayes*, Serjt. (with whom was *Field*), for the appellant.(*a*)—This is a conviction under the 63d section of the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27, which act is incorporated in the Manchester, Sheffield, and Lincolnshire Railway Act, 10 & 11 Vict. c. cclxviii., for placing a vessel in the entrance or outfall of the Old Grimsby Dock without the permission of the harbour-master, and refusing to remove the same when required by him so to do.

(*a*) The points marked for argument on the part of the appellant, were,—

"1. That a bonâ fide claim of title and right having been raised, the justices had no jurisdiction to decide upon the information, or over the offence charged:

"2. That the justices have decided a question of title and claim of right, over which they have no jurisdiction:

"3. That, there being a claim of right and title, the appellant was not guilty of the offence charged:

"4. That the appellant had the right to moor the packet in the place in question, under the 33d section of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), the place in question being part of the dock therein mentioned:

"5. That the respondent's direction under the 63d section of the said Harbours, Docks, and Piers Clauses Act, 1847, was in exercise of his power without reasonable cause, and in an unfair and unreasonable manner."

The 33d section of the general act enacts, that, "upon payment of the rates made payable by this and the special act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers." And s. 54 enacts, that, "if any harbour-master, or any of his assistants, without reasonable cause, or in an unreasonable or unfair manner, exercise any of the powers or authorities vested in the harbour-master by this or the special act, the person so offending shall for every such offence be liable to a *penalty not exceeding 5*l*." Then comes the 63d section, which enacts, [*674 "that, as soon as the harbour or dock shall be so far completed as to admit vessels to enter therein, no vessel, except with the permission of the harbour-master, shall lie or be moored in the entrance of the harbour or dock, or within the prescribed limits; and, if the master of any vessel either place it or suffer it to remain in the entrance of the harbour or docks, or within the prescribed limits, without such permission, and do not, on being required to do so by the harbour-master, forthwith proceed to remove such vessel, he shall be liable to a penalty not exceeding 5*l*., and a further sum of 20*s*. for every hour that such vessel shall remain within the limits aforesaid after a reasonable time for removing the same has expired after such requisition." The question is, whether the rights of the proprietors of "The Pelham" packet, who were the owners of the jetty at which the vessel was moored, are taken away by the 63d section of the general act. [CROWDER, J.—The words of the 63d section are very general; and it is an act passed for public purposes.] No doubt the words are very general; and the appellant's case falls literally within them: the only question is, whether the court will, taking the whole act together, so construe them as to deprive parties of their private rights.

Boden, for the respondent, was not called upon.(*a*)

*WILLIAMS, J.—I am of opinion that the conviction was right, [*675 and must be sustained. The public conduct of the harbour is regulated by the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27. The language of the 63d section is quite general. The intention of that section evidently was, to make all private rights subservient to the general convenience and the regulation of the harbour. If the harbour-master has exercised the powers vested in him without reasonable cause, or in an unreasonable or unfair manner, the appellant's remedy is under the 54th section.

CROWDER, J.—I am of the same opinion. The 63d section of the Harbours, Docks, and Piers Clauses Act, 1847, overrides everything where there is a harbour and a harbour-master, no matter what rights

(*a*) The points marked for argument on the part of the respondent, were,—

"1. That, under the circumstances stated in the case, the conviction of the appellant was right, and the same is good and valid in law:

"2. That no real claim of right to property, as alleged, was in question before the convicting justices, so as to deprive them of jurisdiction; that the pretended claim set up by the appellant, even if the same had been well founded in fact (of which there was no legal evidence), was irrelevant to the matter of the complaint before the justices, and afforded no legal answer thereto; that such pretended claim, so far as the same had any application to the matter in question before the justices, was wholly inconsistent with and contrary to the express provisions of the statutes referred to in the case, and on which the conviction was founded:

"3. That the several objections to the conviction stated in the case, are respectively insufficient, and cannot be supported in law, for the reasons (amongst others) therein set forth."

of property may exist in private individuals. The words are as general as they can be; and there is nothing to exclude the owners of property from their operation. The appeal must be dismissed, with costs.

Appeal dismissed, with costs.

*676] *MUNSTER *v.* THE SOUTH EASTERN RAILWAY COMPANY. *May* 27.

By a railway act it was enacted, "that, without extra charge, it should be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing, not exceeding 40 lbs. in weight and four cubic feet in dimensions; and that the said company should in no case be in any way liable or responsible for the safe carriage or custody of, or for any loss of or injury to any articles, matters, or things whatsoever carried upon or along the said railway with or accompanying the person of or belonging to any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing not exceeding the weight and dimensions aforesaid."

Pursuant to the powers conferred upon them by the act, the company made certain rules and regulations as to passengers' luggage; amongst others, one requiring it to be labelled, and declaring that they would not be responsible for the loss or detention of articles not labelled and properly addressed,—and another declaring that all unclaimed property found on their premises or in their carriages should be deposited in a place called the lost property office, and restored to the owner on payment of a fee of 6*d.* for each article. In addition to these regulations, the company gave private instructions to their servants, to the effect that "no small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, nor bundles of rugs, coats, and wrappers strapped together, are to be labelled or placed in the luggage-van: the passengers must take charge of such articles themselves, or send them as booked parcels."

The plaintiff, a passenger upon the railway, required one of the company's porters to label and place in the luggage-van a package (within the stipulated weight and dimensions) consisting of articles of wearing apparel, and wrapped in a shawl fastened with a strap, and properly addressed. The porter refused to label the package, and insisted upon placing it in the carriage with the plaintiff. The plaintiff declined to allow this, unless it was to be at the company's risk. The package was left behind, and was afterwards taken to the lost property office, where it was detained, and 6*d.* demanded for its restoration:—

Held, that the company were not justified in refusing to carry the package at their own risk, and were responsible for its detention.

Semble, that, if the company had been justified in refusing to carry the parcel, they might have been justified in taking it to the lost property office.

THIS was an action against the South Eastern Railway Company for the alleged unlawful detention of a passenger's luggage.

The first count of the declaration stated, that, at the time of the grievances thereinafter mentioned, the defendants were the owners and proprietors of a railway from a station or terminus of the defendants in the borough of Southwark, in the county of Surrey, to a station or terminus called Tunbridge Wells Station, in the county of Kent, and of engines and carriages used by them for the carriage and conveyance of passengers and their luggage, and of goods and chattels, upon and along their said railway from the said station in Southwark to the said Tunbridge Wells Station, for hire and reward to them the defendants in that behalf; and the defendants, during all the time aforesaid, were

*677] *common carriers for hire of passengers, together with their luggage, and of goods and chattels, on the railway aforesaid, and between the places aforesaid: that the plaintiff requested the defendants, to wit, on the 10th of December, 1856, to carry and convey the

plaintiff as a passenger, and the luggage of the plaintiff, consisting of divers goods and chattels, from the said station in Southwark to the said Tunbridge Wells Station, and tendered himself to be so carried and conveyed as a passenger, together with his said luggage, to the defendants at the said station in Southwark, that being the place used by the defendants in their business as common carriers as aforesaid for receiving passengers, together with their luggage, to be carried and conveyed as aforesaid; and the plaintiff then became a passenger on the said railway of the defendants, and was carried by them in one of their said carriages along the said railway from the said station in Southwark to the said Tunbridge Wells Station, for hire and reward: yet that, although the defendants then had ample convenience for carrying and conveying the whole of the said luggage of the plaintiff, together with the plaintiff, and the plaintiff then paid to the defendants such sum of money as the defendants were entitled to for the carriage and conveyance of the whole of the said luggage of the plaintiff together with the plaintiff; and although the defendants did on that occasion receive, carry, and convey other passengers, together with their luggage, from the said station in Southwark to the said Tunbridge Wells Station; and although all conditions precedent were performed, and all things were done and happened, to entitle the plaintiff to have the whole of his said luggage carried and conveyed, together with himself, on that occasion, from the said station in Southwark to the said Tunbridge Wells Station,—the defendants wholly refused to carry and convey a part of the said luggage of the *plaintiff, that is to say, one package of the plaintiff, from the said station in Southwark to the said Tunbridge Wells [*678 Station, together with the plaintiff, or at all; whereby the plaintiff was put to great inconvenience and expense, and was deprived of the said part of his luggage for a long space of time.

The second count stated, that, at the time of the grievances thereinafter mentioned, the defendants were the owners and proprietors of the said railway in the first count mentioned, and of engines and carriages used by them upon and along the said railway, as in the first count mentioned, and were such common carriers for hire as in the first count mentioned; and that, on the 12th of December, 1856, the plaintiff requested the defendants to convey the plaintiff as a passenger, and the luggage of the plaintiff, &c., as in the first count.

The third count was similar, but laying the date on the 17th of December, 1856.

The fourth count was similar, but laying the date on the 7th of February, 1857.

The fifth count stated, that, at the time of the grievances in that count mentioned, the defendants were the owners and proprietors of the railway in the first count mentioned, and of engines and carriages used by them, as in the first count mentioned, and that the defendants, on the 10th of December, 1856, agreed with the plaintiff, under and subject to certain terms and conditions then agreed on between the plaintiff and the defendants, to carry and convey the plaintiff as a first-class passenger, together with certain luggage of the plaintiff, on a certain journey from the said station in Southwark to the said Tunbridge Wells Station, for hire and reward to the defendants; and the plaintiff then became and was received by the defendants as a first-class passenger, to be carried

*679] and conveyed, *together with his said luggage, from the said station in Southwark to the said Tunbridge Wells Station, under and subject to the said terms and conditions: and that, although the plaintiff performed all things on his part to be performed, and all conditions precedent were fulfilled, and all things were done and happened, to entitle the plaintiff to the performance of the said agreement by the defendants, and to have the whole of his luggage carried and conveyed by the defendants on the said journey, from the said station in Southwark to the said Tunbridge Wells Station, together with the plaintiff, according to the said agreement; yet the defendants wholly refused to carry and convey a part of the said luggage of the plaintiff, that is to say, one package of the plaintiff, together with the plaintiff, or at all; and the plaintiff was thereby put to great inconvenience and expense, and was deprived of the said part of his said luggage for a long space of time.

The sixth, seventh, and eighth counts were the same as the fifth, but laying the dates respectively on the 12th and 17th of December, 1856, and 7th of February, 1857.

The ninth count alleged that the defendants converted to their own use, and wrongfully deprived the plaintiff of the use and possession of,(*a*) the plaintiff's goods, that is to say, four packages of the plaintiff, containing articles of clothing.

*680] *The tenth count alleged that the defendants detained from the plaintiff certain goods and chattels of the plaintiff, that is to say, four packages of the plaintiff, containing articles of clothing.

The eleventh count stated, that theretofore, and at the several times and occasions thereinafter mentioned, the defendants were common carriers, and the owners and proprietors of the said railway, engines, and carriages mentioned in the first count, and that, on several occasions before this suit, the defendants contracted with him, the plaintiff, for reward to them in that behalf, to carry and convey the plaintiff, with certain luggage to him belonging, from the said station in Southwark to the said station at Tunbridge Wells, by their train of carriages, subject, amongst others, to the following terms and regulations, published by the defendants in the words and figures following, that is to say,—"9. Passengers' luggage. First-class passengers are allowed 100 lbs. of luggage free of charge, such luggage being of the description mentioned in the company's (thereby meaning the defendants') act of parliament. 10. Luggage to be claimed and labelled. Passengers are requested, after taking their tickets, to claim their luggage on the platform, and to see it marked with the company's (meaning the defendants') labels; and no luggage will be placed in the train until it is so marked. The company

(*a*) This redundancy of expression is persisted in by pleaders, notwithstanding its uselessness has been repeatedly pointed out and explained. The form of a count for a conversion, as originally given in Sched. (B.), No. 28, to the Common Law Procedure Bill, 1852, was as follows:—"That the defendant converted to his own use the plaintiff's goods, that is to say, iron, hops, household furniture [*or as the case may be.*"] When the bill was before the House of Lords, a noble and learned lord, conceiving that there might be cases to which that form would be inapplicable, proposed and succeeded in getting inserted an alternative,—"*or* wrongfully deprived the plaintiff of the use and possession of;" but those words were printed in the amended bill, and afterwards in the act, without the usual marks "[ ]" to denote that they were to be *substituted*, when necessary, for the preceding words. In applying the form as it stands, the pleader turns "or" into "and."

(meaning the defendants) will not be responsible for the loss of any *article of luggage that is not marked with their label, and properly addressed:" Averment, that, in making the said contract [*681 with the defendants on each of the said occasions, the plaintiff was a first-class passenger, and received from the defendants, and paid for, a first-class ticket accordingly; that, on each of the said occasions, the plaintiff had certain luggage with him, being luggage of the description mentioned in the company's act of parliament, which he contracted and required to be carried in the same train with him, subject to the said terms and regulations, and which, being under 100 lbs. in weight, the defendants were bound to convey for the plaintiff, as such first-class passenger as aforesaid, free of charge, and which luggage was also properly addressed, in accordance with the said regulations; and that, on each of the said occasions, after taking his said ticket, the plaintiff claimed his said luggage on the defendants' platform, and requested the defendants that it might be marked with their label or labels, in accordance with the said regulations; yet that the defendants, disregarding their said contract, and their duty, refused to carry and convey the said luggage for and with the plaintiff, subject to and in accordance with the said regulations, and also refused to mark the same with their label or labels, or to place the same in the said train, in accordance with the said regulations,—whereby the plaintiff was put to great expense and inconvenience, and was forced and obliged to go and be carried as such passenger as aforesaid from Southwark aforesaid to Tunbridge Wells aforesaid without his said luggage, and was afterwards obliged to pay divers sums of money to the defendants, in order to recover and obtain possession of his said luggage; and the plaintiff had in other respects, by reason of the said default of the defendants, been greatly damaged, &c.

*The defendants pleaded,—first, to the first four counts, not guilty. [*682

Secondly, to the first four counts, that the defendants were not common carriers as in those counts respectively alleged.

Thirdly,—to the first four counts, that the plaintiff did not make the payments in those counts respectively alleged.

Fourthly, to the fifth, sixth, seventh, and eighth counts, that the defendants did not agree as in those counts alleged.

Fifthly, to the fifth, sixth, seventh, and eighth counts, the defendants denied the said alleged breaches of the said agreements, and said they were not guilty of the same.

Sixthly, to the ninth count, not guilty.

Seventhly, to the tenth count, that the defendants did not nor do detain the said goods as alleged.

Eighthly, to the ninth and tenth counts, that the said goods and chattels were not the goods or chattels of the plaintiff.

Ninthly, to the tenth count, that, before and at the times of the said detention of the said goods and chattels, the defendants were possessed of a certain railway and lands, and because on the occasion in that count mentioned the said goods were wrongfully in and upon the said railway and lands, encumbering the same and doing damage there to the defendants, the defendants on the said occasion seized and took in and upon the said railway and lands the said goods and chattels as a

distress for the damage so by them done and doing, and impounded the same, and kept and detained and still kept and detained the same so impounded as such distress, in a proper and convenient place; which were the grievances in the said count complained of.

*683] Tenthly, to the tenth count, the defendants further *said that the said goods and chattels were four bundles of goods, and each of the said bundles was, at different times before the alleged grievance, deposited and left by the plaintiff with the defendants, to be kept, taken care of, and warehoused by the defendants for the plaintiff for reward to the defendants, and upon the terms that the defendants should have a lien thereon for such reward; and that the defendants received each of the said bundles upon those terms, and did accordingly keep, take care of, and warehouse the same; and that, before the alleged grievances, such reward became and was, and still remained, due to the defendants from the plaintiff in respect of each of the said bundles, which reward remained due; and, the defendants being entitled to a lien upon each of the said bundles respectively for the reward due in respect thereof, they the defendants thereupon refused to deliver up and had not delivered them up to the plaintiff,—which were the alleged grievances in the said tenth count complained of.

Eleventhly, to the tenth count, that the defendants did what was complained of by the leave of the plaintiff.

Twelfthly, to the last count, that the defendants did not contract as alleged.

Thirteenthly, to the last count, that the said luggage was not luggage of the description mentioned in the company's acts of parliament.

Fourteenthly, to the last count, that the contracts in that count mentioned were also made subject to the following terms, that is to say, that such of the plaintiff's luggage as consisted of small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, or bundles of rugs, coats, or wrappers, strapped together, should not be labelled or placed in the luggage-van of the train by which the plaintiff was

*684] *conveyed, and that the plaintiff should take charge of such articles, or send the same as booked parcels; and that the said luggage which the defendants refused to carry and convey and to mark with their label or labels as aforesaid, on each of the said occasions, was and consisted of small articles of the description aforesaid, wherefore the defendants refused to mark the same with their label or labels or place the same in the luggage-van of the said train, which the plaintiff requested the defendants to do; and the defendants were willing that the plaintiff should take charge of the said luggage in the said train, and that the defendants should so carry and convey the same with him on and to the end of the said journey, or that the same should be sent as booked parcels, in accordance with the said terms and regulations; but the plaintiff refused to take charge thereof, or to so send them, and insisted on the same being labelled and placed in the luggage-van of the said train, and would not otherwise suffer or permit the defendants to carry or convey the same for or with the plaintiff; wherefore the defendants did on the said occasions refuse to carry and convey the same.

Fifteenthly, as to the last count, the defendants further said that the said contracts in that count mentioned were also made subject to the

following terms, that is to say, that such of the plaintiff's luggage as consisted of small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, or bundles of rugs, coats, or wrappers strapped together, should not be labelled or placed in the luggage-van of the train by which the plaintiff was conveyed; and that the said luggage which the defendants refused to carry and convey and to mark with their label or labels as aforesaid, on each of the said occasions, was and consisted of small articles of the description mentioned; wherefore the defendants refused to mark the same with *their label or labels, or place the same in the luggage-van of the said train, which the plaintiff [*685 requested the defendants to do; and that the defendants were ready and willing to carry and convey the same with the plaintiff on and to the end of the said journeys in one of the carriages by the train respectively by which the plaintiff with his luggage was to be so carried and conveyed as aforesaid, otherwise than the luggage-van, but the plaintiff refused to suffer or permit the defendants so to carry and convey the same, and insisted on the same being labelled and placed in the luggage-van of the said train; wherefore the defendants did on the said occasions refuse to carry and convey the same.

The plaintiff joined issue on the first, second, third, fourth, fifth, sixth, seventh, eighth, twelfth, and thirteenth pleas, and took issue on the ninth, tenth, eleventh, fourteenth, and fifteenth pleas. And, as to the ninth plea, he said, that, on each of the said occasions when the defendants seized and took the said goods and chattels as in that plea mentioned, the same were then respectively in and upon the said railway and lands, encumbering the same, and doing damage there as in that plea alleged, by the leave and license of the defendants, and in pursuance of contracts before then respectively entered into between the plaintiff and the defendants. Issue thereon.

The cause was tried before Erle, J., at the last Spring Assizes for Surrey. The facts as they appeared at the trial (the plaintiff himself being the only witness examined) were as follows:—The plaintiff is a barrister, having a residence at Tunbridge Wells, to which place the South Eastern Railway Company have a branch line from their main line at Tunbridge. On the respective days mentioned in the declaration, viz. the 10th, 12th, and 17th of December, 1856, and 7th of February, 1857, the plaintiff was a first-class passenger *by the railway from London to Tunbridge Wells. At the several times in [*686 question, the following, amongst others, were the regulations of the company for the carriage of passengers and their luggage upon the railway,—which regulations were duly published in their time-tables, and of which the plaintiff had notice:—

"9. *Passengers' luggage.* First-class passengers are allowed 100 lbs. of luggage, second-class 60 lbs., and third-class 56 lbs., free of charge; such luggage being of the description mentioned in the company's act of parliament. Children who pay half-price are allowed half the foregoing quantity. Overweight will be charged one farthing per lb. for any distance under forty miles, and one halfpenny per lb. for any distance exceeding forty miles. Commercial travellers passing to various parts of the line during the same day will be charged overweight at the above rates for the farthest point of destination only, if declared at the

commencement of the day's journey, and the luggage-ticket given up at the termination.

"10. *Luggage to be claimed and labelled.* Passengers are required, after taking their tickets, to claim their luggage on the platform, and to see it marked with the company's labels; and no luggage will be placed in the train until it is so marked. The company will not be responsible for the loss or detention of any article of luggage that is not marked with their label and *properly addressed;* nor for luggage of any other description than that mentioned in their acts of parliament, except a declaration of its nature and value be made at the time, and it be booked and paid for accordingly. All passengers' luggage is conveyed subject to the conditions upon which goods are carried by the company.

"11. All unclaimed property found on the company's premises, or in their carriages, is deposited in the Lost Property Office at the London Bridge terminus. If *there be an address on the articles found, notice will be sent to that address, that the property is in the company's possession; and, if there be no address thereon, the packages will be opened at the expiration of one week, with a view to ascertain the address of the owner, when notice will be forwarded to him: and the property will in either case be restored to the owner, on payment of 6*d.* for each article, or forwarded, if desired, at the usual parcels rate. An additional charge of 6*d.* per week is made, after the expiration of the first week, on each article left for a longer period."

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The facts detailed by the plaintiff, as to the first of the parcels, were as follows:—The plaintiff, who resided at Tunbridge Wells, was in the habit of going backwards and forwards between that place and London by the South Eastern Railway. On the 10th of December, 1856, he took a first-class ticket at London Bridge station by the 8.30 train for Tunbridge Wells. He had with him a small portmanteau, a cloak, a small morocco bag, a stick, an umbrella, and *a bundle containing a book-slide of ornamental Tunbridge-ware and a silk coat, wrapped up in a plaid shawl fastened with a strap, but open at each end, and having two pots of cocoa placed under the strap. This bundle was not addressed.* The whole would weigh about 50 lbs. The plaintiff asked a porter to label the portmanteau and the bundle. The porter labelled the former, but declined to label the latter, saying (after consulting the station-master) that it was contrary to his instructions to put a label upon such a package,—alluding to an unpublished regulation issued by the company on the 1st of August, 1853, for the guidance of their servants, and which was as follows: "In future, no small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, nor bundles of rugs, coats, and wrappers strapped together, are to be labelled or placed *in the luggage-van. The passengers must take charge of such articles themselves, or send them as booked parcels." The porter then proposed to put the bundle into the carriage with the plaintiff, saying that the company could not be responsible for such a package, and that, if the plaintiff would not take it, he (the porter) must carry it to the lost luggage office. The plaintiff said he knew nothing about their regulations, that he would not have the bundle in the carriage with him, and that the company must take charge of it. The bundle was accordingly left upon the platform, and subsequently taken to the lost luggage office, where the defendant saw and demanded it on the follow-

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ing day, but the company's servants refused to restore it to him except upon payment of 6*d.*; and, as the plaintiff declined to pay the sum demanded, the bundle was retained.

On the 12th of December, the plaintiff went again by the same train with a bundle consisting of a shawl, wrapped round some articles of clothing, a number of the Law Journal, a volume of sermons, and some papers, fastened with two straps placed transversely, and sealed, and addressed to himself.

On the 17th of December, the plaintiff went again by the same train, with a bundle consisting of articles of wearing apparel packed in a wrapper, sealed, and addressed to himself.

On the 7th of February, 1857, the plaintiff went again by the same train, with a bundle consisting of wearing apparel with a shawl wrapped round, and cross-strapped.

Each of the parcels was worth 5*l.*; and on each of the last three occasions the same altercation took place, and with the like result.

The plaintiff avowed that his intention in making up these parcels was to try his right to have them carried by the company; and that, in consequence of the *change of carriages at Tunbridge, he had on former occasions been put to considerable inconvenience in having to take charge of his own luggage on the platform there. [*689

On the part of the plaintiff it was insisted, that the company were bound, as well by their common-law duty as carriers as by the 131st section of their act of incorporation, 6 & 7 W. 4, c. lxxv.,(*a*) to carry passengers' luggage at their own risk, and could not relieve themselves from that responsibility by insisting upon the passenger taking any portion of his luggage in the carriage with him; that they could not make a regulation requiring packages to be labelled, and then by refusing to label exempt themselves from liability; and that they *had no right to insist upon the payment of a fee for the restoration of the articles. [*690

For the defendants, it was submitted, that though a duty might be imposed upon the company, by the 131st section of their act, to carry articles of the description, weight, and dimensions therein mentioned, they had a right to place them in any part of the train they pleased; that the 151st section gave them power to make regulations as to the conveyance of luggage; that no duty was imposed upon them either by the statute or by the common law to label any parcels, however packed, which might be brought to them; that they had a right to reject

(*a*) Which enacts, "that, without extra charge, it shall be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing, not exceeding 40 lbs. in weight, and four cubic feet in dimensions; and the said company shall in no case be in any way liable or responsible for the safe carriage or custody of, or for any loss of or injury to, any articles, matters, or things whatsoever carried upon or along the said railway with or accompanying the person of or belonging to any passenger, or delivered for the purpose of being carried other than and except such passenger's articles of clothing not exceeding the weight and dimensions aforesaid: Provided always that nothing herein contained shall in any case extend or be deemed or construed to extend to charge or make liable the said company further or in any other case than where according to the laws of this realm for the time being stage-coach proprietors and common carriers would be liable; nor shall anything herein contained extend or be deemed or construed to extend in any degree to deprive the said company of any protection or privilege which either now or at any time hereafter common carriers or stage-coach proprietors have or may have, but the said company shall from time to time and at all times have and be entitled to the benefit of every such protection and privilege."

such as were improperly or insufficiently packed; that, the bundles in question having been left upon the platform in consequence of the refusal of the plaintiff to allow them to be placed in the carriage with him, the company's servants were justified in taking them to the lost luggage office; and that the charge of 6*d.* per package demanded for their restoration was not unreasonable.

The learned judge was of opinion that a duty was imposed upon the company by s. 131 to carry luggage, and that there had been no absolute refusal on the part of the company's servants to carry the packages in question; but only a refusal to accede to the plaintiff's demand that they should be labelled and placed in the luggage-van and carried at the company's responsibility; and that the parcels in question were not packed so as to be reasonably fit to be carried in the luggage-van. He thereupon directed a nonsuit,—reserving leave to the plaintiff to move to enter a verdict for the value of the parcels, if the court could infer from the facts that the plaintiff was entitled to recover,—the defendants to have leave, if necessary, to add a plea that they were ready and willing to perform the contract, but that the plaintiff altogether refused to permit them to do so.

*691] *The learned judge appended to his report the following statement:—

"Four packages were offered,—on the 10th, 12th, and 17th of December, 1856, and 7th of February, 1857. The first was a shawl, open at each end, with two pots of cocoa under the strap, and a book-slide of ornamental inlaid Tunbridge-ware inside. On this parcel the contest was begun; and that which passed as to this parcel the jury must be taken to have found as to the three others. The plaintiff required it to be labelled and taken charge of as luggage, with the responsibility attaching in respect to luggage so received. The defendants refused to label it, and so to take charge of it; but offered to place it in any carriage in which the plaintiff might be or wish it to be without a label, and without the responsibility attaching in respect of luggage so received. The plaintiff was going to Tunbridge Wells. At Tunbridge the carriage is changed: the labelled luggage is transferred by the porters of the company, who are responsible, not only for safe carriage but for correct delivery at the labelled destination: the packages not labelled, carried with the passenger, are to be transferred, either by himself or by porters acting under his direction, and on his responsibility as to the destination. The plaintiff refused to point out any carriage in which the package should be placed under his charge,—insisting that it should be labelled and taken by the company. This they refused to do. The parcel was therefore left on the platform, and was taken to the unclaimed parcel office, where it was offered to the plaintiff on payment of 6*d.* This being refused, the action was brought.

"The second parcel was a shawl wrapped round some articles of clothing and books, made into a square package, with two straps placed transversely, and addressed to the plaintiff.

*692] *"The third was a parcel of clothing packed in a wrapper of blue calico,—merely a wrapper: this was carried and delivered as luggage.(*a*)

(*a*) There is some inaccuracy in this statement. This parcel was not one of those in question.

"The fourth was the same calico parcel completely covered with a shawl, and strapped crossways, as before described. This was refused in the same manner and on the same grounds, and with the same offer, as the first.

"The first objection by the company to the counts on the duty to label and carry, was, that there was no duty to label created by statute or common law. This I held to be clear. The question turns on the statute 6 & 7 W. 4, c. lxxv., which enacts that it shall be lawful for the passenger to carry so much in size and weight of wearing apparel. This the defendants had been willing and offered to permit the plaintiff to do.

"The second objection was on the count (the 11th) on a contract to label luggage, founded on regulations No. 9 and 10. I said I thought they created no contract to label, but created a responsibility for delivery at destination if a label were put on; that the regulation declaring that the company would not be responsible for luggage not labelled, did not exempt them from responsibility in respect of luggage not labelled, if it was damaged by any breach of duty on their part; and that the responsibility intended by regulation No. 10 was, the responsibility of delivering at the labelled destination alone. I further thought that luggage must be reasonably secured and fitted for transit without damage in the carriage appropriated to luggage: that the company were not bound to receive as luggage every article of wearing apparel which a passenger might offer, unless it was reasonably secured and fitted for transit without *damage; that the regulation for rejecting shawls as [*693 luggage was lawful, and on this principle I thought that, when the plaintiff tendered a shawl uncovered and unprotected, he did not tender luggage which the company were bound to receive and label and carry to its destination at their risk for safe and correct delivery: and that the fact that the shawl contained some articles of clothing made no difference, if the shawl was the outside of the package. I further thought that the package was left by the plaintiff on the platform, and so became an unclaimed parcel, and so was lawfully warehoused by the company, and so was lawfully detained till a reasonable compensation for warehousing was paid: and I held 6*d.* to be a reasonable charge therefor."

Bovill, Q. C., in pursuance of the leave reserved, in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiff for 20*l.*, if upon the facts the court should think it ought to be so entered.

Edwin James, Q. C., and *Woollett*, now showed cause.—It was perfectly competent to the company to make reasonable regulations as to the terms and mode of conveying packages like those in question, and to reject and refuse to carry or to label things insecurely packed or not properly addressed. [WILLIAMS, J.—Do you contend that the company can cast upon the passenger the burthen of taking personal charge of his luggage?] They were not bound to put it in any particular part of the train; and they were always willing to carry these packages provided the plaintiff would suffer them to be placed in the carriage in which he himself was,—which was a safe and a reasonable place. [COCKBURN, C. J.—I do not collect from the evidence that the plaintiff refused to allow the packages to be *placed in the carriage with [*694 him. All he objected to was,—and I think the objection a

reasonable one,—that they should be placed under his personal charge, and be carried at his risk.] The circumstance of their not being labelled, and of their being placed in the carriage with the passenger, will not relieve the company from any responsibility which the law casts upon them: Richards *v.* The London, Brighton, and South Coast Railway Company, 7 C. B. 839 (E. C. L. R. vol. 62); Butcher *v.* The London and South Western Railway Company, 16 C. B. 13 (E. C. L. R. vol. 81). These packages appeared upon the face of them to be anything but "luggage." There is a material distinction between "luggage," properly so called, and the lighter articles which a traveller usually carries in his hand. The definition of luggage in Richardson's Dictionary, is, "heavy, cumbrous baggage or package." [COCKBURN, C. J.—Surely you cannot insist that the company mean to confine themselves to Richardson's definition. Suppose a gentleman is going to spend a night at the house of a friend in the country,—would not the contents of a carpet-bag such as are ordinarily taken on such occasions be luggage?] They might come within the definition of "articles of clothing" in s. 131 of the 6 & 7 W. 4, c. lxxv. [COCKBURN, C. J.—The whole contention here seems to have been, not as to where the articles should be placed, but at whose risk they were to be carried. The plaintiff seems to have been under an impression that if he took them in the carriage with him the company would evade all responsibility in respect of them. And the porter and station-master evidently thought so too.] In Robinson *v.* Dunmore, 2 Bos. & P. 416, Chambre, J., says: "It has been determined, that, if a man travel in a stage-coach and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable *if the portmanteau be *695] lost. In this case, the plaintiff, for greater caution, sends his servant with the goods, who pays for the watching them because he apprehends danger of their being stolen. So, the man who travels in a stage-coach has some care of his own property, since it is more for his interest that the property should not be lost, than that he should have an action against the carrier." It is clear, therefore, that the company would avoid no responsibility by the packages going in the carriage with the passenger. [COCKBURN, C. J.—They say they will not be responsible for luggage unless marked with their label, and they capriciously refuse to label things of this sort. Is the passenger, with notice that such a regulation exists, bound to submit to have his luggage placed in the carriage with him, with notice from the company that they will not be responsible for its safe conveyance?] The company had a right to carry the articles as and where they pleased: it was not a question of responsibility. [BYLES, J.—The report of the learned judge is conclusive on that point. He says, speaking of one package; and the same applies to all,—"The plaintiff required it to be labelled and taken charge of as luggage, with the responsibility attaching in respect to luggage so received. The defendants refused to label it, and so to take charge of it; but offered to place it in any carriage in which the plaintiff might be or wish it to be, without a label, and without the responsibility attaching in respect of luggage so received."] That is a fallacious view of the learned judge. [COCKBURN, C. J.—It is the view of the facts upon which the nonsuit proceeds.] The court are to draw inferences for themselves from the facts. [COCKBURN, C. J.—The company's servants

want to place a package under the seat of the carriage with the passenger. The latter says "I will not have it placed here, because that will cast upon *me the responsibility which ought by law to rest upon the company." It was evidently a mere struggle, not as [*696 to the place of carriage, but as to the liability of the carrier for its safety. What right had the company, under the circumstances, to treat this as lost luggage?] If they were justified in refusing to carry it, and it was in consequence of the plaintiff's declining to receive it in the carriage with him that it was taken to the lost luggage office, they clearly were entitled to treat it as lost or abandoned. The regulations in this respect were perfectly fair and reasonable. They could not leave the goods on the platform, and the porter could not rudely thrust them upon the passenger against his will. [COCKBURN, C. J.—The company knew very well to whom the articles belonged: and it appears from the report that all the packages were directed but one.]

Bovill, Q. C., *Garth*, and *H. Matthews*, in support of the rule.—By the 131st section of the 6 & 7 W. 4, c. lxxv., the company are bound to carry a certain amount of articles of clothing for every passenger free of charge. They make regulations, which perhaps they are warranted in doing, by one of which they require that all luggage shall be labelled, or they will not be responsible for any loss or detention; and then they make a private regulation by which they prohibit their servants from putting their labels upon certain articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, bundles of rugs, coats, and wrappers strapped together,—which are not to be placed in the luggage-van, but must be taken charge of by the passengers themselves or sent as booked parcels. They clearly are not justified in so limiting the responsibility which the law casts upon them. There is no plea here that the articles were not properly packed. [COCKBURN, C. J.—If the defendants were justified in refusing to *carry these packages, they would be [*697 justified in taking them to the lost luggage office: and, if they were justified in taking them there, there was no conversion; and the point arises upon not guilty.] The company clearly were bound to receive and to carry these packages. To make out a plea such as that which it was proposed at the trial to add, the company must show that they were ready and willing and offered to carry the articles upon the terms mentioned in the act of parliament. This they clearly never did; for, the only offer to carry, was, upon the terms that the passenger should take the risk upon himself. This clearly was the only contention between them.

The court intimating that they thought the company were liable in respect of the two last parcels, which exclusively consisted of articles of clothing, but that they entertained some doubt as to the others, which besides clothing contained articles not coming within the description of personal luggage, *Bovill* consented to confine the verdict to 10*l.*, the value of the last two.

COCKBURN, C. J.—I am of opinion that the rule must be made absolute to set aside the nonsuit and to enter a verdict for the plaintiff in respect of the last two parcels which were the subject of the action, and which contained articles of clothing only. The facts, as applicable to these, were as follows:—The plaintiff, having sufficiently packed or tied together the articles (consisting of wearing apparel), and being himself

a passenger by the train, desired that the packages might be labelled and placed with the rest of the passengers' luggage. The railway porter to whom this request was addressed, after consultation with the station-master, declined to comply with it. It appears that the 131st
*698] section of the company's act of incorporation (6 & 7 *W. 4, c. lxxv.) compels the company to carry a certain quantity of articles of clothing for each passenger free of charge. The act also enables the company to make rules and regulations in respect of the conveyance of passengers and their luggage, one of which (the 10th) was as follows,—"Passengers are required, after taking their tickets, to claim their luggage on the platform, and to see it marked with the company's labels; and no luggage will be placed in the train until it is so marked. The company will not be responsible for the loss or detention of any article of luggage that is not marked with their label and properly addressed, nor for luggage of any other description than that mentioned in their acts of parliament, except a declaration of its nature and value be made at the time, and it be booked and paid for accordingly." The plaintiff, being aware of this regulation, and intending to compel the company to assume the responsibility of the safe carriage of the packages in question, calls upon the company's servant to label them. This he refuses to do. It is impossible to avoid seeing that the contention between the parties here was, whether the company, by refusing to label the packages, could divest themselves of their common-law liability as carriers for the safe conveyance of the articles. They appear to have sought to relieve themselves of such liability by requiring all luggage to be labelled, and then giving a direction for the guidance of their servants, that, "in future, no small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, nor bundles of rugs, coats, and wrappers strapped together, are to be labelled or placed in the luggage-van: the passengers must take charge of such articles themselves, or send them as booked parcels." Acting upon that direction, the porter and station-master decline to label the packages in question
*699] and to place them in the luggage-van; telling the *plaintiff, that, if they go at all, they must go in the same carriage with the plaintiff himself. To this the plaintiff objects, on the ground that the company were thereby endeavouring to relieve themselves from their ordinary liability as common carriers. This being the struggle between the parties, the porter threatens to take the package to the lost luggage office, unless the plaintiff will consent to have it placed in the carriage with him. The plaintiff says: "Put the package where you please: but you shall not impose upon me the responsibility of taking charge of it myself." The things are thereupon left upon the platform, and afterwards taken by the porter to the lost luggage office,—treating them as property of which the owner was unknown. I am of opinion that the porter was not justified in so doing, and that the company are responsible for his acts. The plaintiff did nothing to prevent the company's servants from putting the packages into the carriage in which he was, or in any other part of the train. All he said, was, that, if the packages were placed in the carriage with him, the company were not to consider that as a recognition on his part that he had taken upon himself any obligation with respect to them which would not attach to him if they were placed elsewhere. I think there was nothing done to relieve the

company of their responsibility as common carriers, and their duty under the special act, to carry these packages as luggage; and consequently that the taking them to the lost luggage office and detaining them there was a wrongful act for which they are liable. Whether, therefore, upon the special count or upon the count in trover, I think the plaintiff is entitled to recover in respect of those two packages. I was disposed during the argument to entertain some doubt as to whether, if the company were justified in refusing to carry the articles in question, they were *justified in taking them to the lost luggage [*700 office: but Mr. *James* has satisfied me that, if justified in refusing to carry them, the company were justified in treating them as lost luggage. My judgment rests upon this, that the articles in question consisted of wearing apparel which the company were bound to carry, and that nothing had been done by the plaintiff to absolve them from that responsibility, or to prevent them from placing them in any part of the train,—the plaintiff's conduct amounting to no more than a protest against having cast upon him a responsibility which the law casts upon the company.

WILLIAMS, J.—I am of the same opinion. When the evidence is looked at closely, it is obvious that the real controversy between the plaintiff and the defendants was, whether the latter were bound to take charge of the packages in question with the ordinary responsibilities of carriers of passengers. It is plain that both parties treated packages being carried with the passenger in the carriage, and unlabelled, as being no longer at the risk or under the control of the company. The company, by their servants, refused to carry the packages, because the plaintiff declined to assent to these terms: and the question is, whether they were justified in that refusal. I see no ground of justification except that upon which my Brother Erle decided at Nisi Prius. He thought that the company were not bound to receive as passengers' luggage any article of wearing apparel, unless reasonably secured and fitted for carriage without damage. Now, as the plaintiff has agreed to abandon all claims except in respect of the two packages which consisted exclusively of wearing apparel and shawls, it is unnecessary for me to say whether or not I concur with my Brother Erle in this view. It may well be doubted whether the proposition *is not too largely stated. [*701 There may, no doubt, be cases where articles of this description may be so carelessly and improperly packed as reasonably to justify a refusal on the part of the company to accept them. But it does not follow that they would be justified in rejecting every package which may be imperfectly packed.(*a*) I confess I feel a difficulty in assenting to a proposition so broadly laid down. It is, however, unnecessary to consider that; for, I think we cannot fail to infer from the evidence here, that, as to the two parcels of wearing apparel and shawls which are now in question, they were packed in a way to be reasonably fitted for carriage by the company: and I cannot see why they should have refused to carry them upon the usual terms.

WILLES, J.—I am of the same opinion. It is not necessary to go further for the law than the 131st section of the company's act, 6 & 7 W. 4, c. lxxv., in order to decide the question with reference to the two

(*a*) See Simons *v.* The Great Western Railway Company, 18 C. B. 805 (E. C. L. R. vol. 86).

parcels which alone are now the subject of consideration. That section obliges the company to carry for each passenger free of charge a certain quantity in weight and bulk of articles of wearing apparel. It appears that the plaintiff, being a passenger by a particular train, wanted some luggage consisting of wearing apparel wrapped round, in the one instance with a piece of calico, and in the other with a shawl, and sufficiently secured by means of straps, carried for him by the company, instead of taking charge of it himself. The question is, whether he was entitled to have that done. I am of opinion that he was. It seems that the *702] plaintiff desired to have these packages labelled *and put into the luggage-van. I do not found my judgment upon any supposed right of his to have the packages labelled and placed in any particular part of the train. That is mere matter of detail. It might be reasonable to impose such a condition: but there is no legal right to have a label placed upon the goods. The upshot of the contest was, that the company's servants desired to put these packages in the carriage with the plaintiff, coupled with the understanding that he should take charge of them, and that they should be under his care and at his risk whilst the change of carriages was taking place at Tunbridge,—in short, that they should be at his risk during the whole of the transit. The plaintiff refused to allow the packages to be placed in the carriage with him, —not absolutely, but in a sense that would cast upon him that responsibility; and he ends by saying, in substance: "Put them where you like, provided they are to carried at the risk and upon the responsibility of the company." In the result, the packages are left upon the platform. The servants of the company do not appear to have claimed a right to put the packages in that or in any other carriage unaccompanied by the condition before mentioned. The question is, whether the plaintiff was entitled to have these things carried by the company at their risk, or whether he was bound to take the responsibility of taking care of them himself. It appears to me that that question is disposed of by the 131st section of the company's act, which enacts, that, without extra charge, it shall be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing, not exceeding 40 lbs. in weight, and four cubic feet in dimensions,—a size and weight not ordinarily capable of being conveniently carried by a passenger. In return for this, the company are in no case to be in any way liable *703] or responsible *for the safe carriage or custody of, or for any loss of or injury to any articles, matters, or things whatsoever carried upon or along the said railway with or accompanying the person of or belonging to any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing, not exceeding the weight and dimensions aforesaid. The packages in question did not exceed that weight or those dimensions; nor did they fall within the proviso at the end of the section saving the liability of the company as to matters of special exception. It appears to me, therefore, upon the mere reading of that section, that the company are liable. As to the two packages which the plaintiff has consented to give up, a different question might have arisen. If it had appeared that the company had been in the habit of carrying articles such as were contained in those packages for the fare paid by the passenger, I should have inclined to think that their responsibility would have extended to them also. But,

as Mr. *Bovill* has consented to abandon his claim as to them, it is unnecessary to say anything about them. The rule will, therefore, be absolute to enter a verdict for the plaintiff for 10*l.*, as the value of the two packages first adverted to.

BYLES, J.—I am of the same opinion. I agree with my Lord and my two learned Brothers in thinking, that, although the company have a right to put luggage in any part of the train they please, they cannot absolve themselves from their common-law liability as carriers, nor from the liability imposed upon them by the 131st section of the 6 & 7 W. 4, c. lxxv., by placing it in the carriage with the passenger to whom it belongs. It is quite evident that the real contention between the plaintiff and the porter and station-master was, not *whether the packages should be placed in the carriage with him, but whether [*704 the ordinary liability of the company should be limited by their so doing. The company in effect say to the plaintiff, we will not carry your packages unless you consent to take the risk and responsibility of their safety. The plaintiff declines to accept the risk, and the company refuse to carry; and so the packages are left behind. The defendants are clearly liable on the special count for their refusal to carry the last two parcels, which were left behind through their default; and I think they are also liable upon the count in trover. The rule will, therefore, be absolute to set aside the nonsuit, and to enter a verdict for the plaintiff for 10*l.* upon the issues applicable to the last two parcels, and for the defendants as to the rest. Rule absolute accordingly.(*a*)

(*a*) See Chitty and Temple on the Law of Carriers, pp. 282, et seq.

INGATE and Another *v.* LA COMMISSIONE DEL LLOYD AUSTRIACO, PRIMA SEZIONE. *June* 12.

The 16th, 18th, and 19th sections of the Common Law Procedure Act, 1852, do not apply to the case of proceedings against a foreign corporation carrying on business abroad.

BY the 18th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it is enacted, that, "in case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the schedule (A) to the act *annexed, marked No. 2, which writ shall [*705 bear the endorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat

and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case: provided always that the plaintiff shall and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry or before one of the masters of the said superior courts in the manner hereinafter provided, according to the nature of the case, as such court or judge may direct; and the making such proof shall be a condition precedent to his obtaining judgment."

And s. 19 enacts, that, "in any action against a person residing out of the jurisdiction of the said courts, and not being a British subject, the like proceedings may be taken as against a British subject resident
*706] out of the jurisdiction, save that, in lieu of *the form of writ of summons in the schedule (A) to the act annexed marked No. 2, the plaintiff shall issue a writ of summons according to the form contained in the said schedule (A) marked No. 3, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said schedule also marked No. 3; and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad; and by leave of the court or a judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon."

A writ of summons, dated the 3d of May, 1858, was issued against the defendants, La Commissione del Lloyd Austriaco, Prima Sezione (Austrian Lloyd's Company), a corporation aggregate established according to the law of the empire of Austria, and trading and carrying on business under that name and title at Trieste; and on the 15th of May, the following notice was served by the clerk of the British consul, by delivering it to the secretary of the company at their chief office in the Tergesteo, No. 587, in Trieste:—

"To La Commissione del Lloyd Austriaco, Prima Sezione, of Trieste, in Austria.

"Take notice that Charles Colville Ingate and Frederick Ingate, of Fenchurch Street, in the city of London, England, have commenced an action at law against you in Her Majesty's Court of Common Pleas, by a writ of that court dated the 3d day of May, 1858; and you are required within twenty-one days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said court to the said action:
*707] and, in default of your *so doing, the said Charles Colville Ingate and Frederick Ingate may by leave of the court or a judge proceed thereon to judgment and execution. The plaintiffs claim 1990*l.* 17*s.* 11*d.* for debt, and 7*l.* 7*s.* for costs; and, if the amount thereof be paid to the plaintiffs or their attorneys within twenty-one days from the service hereof, further proceedings will be stayed."

An application was made to Byles, J., at chambers for leave for the plaintiffs to proceed, upon affidavits stating the above facts, and also that the defendants at and before the commencement of the suit were, and still were, justly and truly indebted to the plaintiffs in the sum of 1990*l.*

17*s.* 11*d.* for money paid in England, within the jurisdiction of this court, by the plaintiffs for the defendants, at their request, and for commission and reward due and payable by the defendants to the plaintiffs for work done in England, within the jurisdiction of this court, by the plaintiffs for the defendants at their request; that it takes five days to communicate between London and Trieste by post; and that no appearance has been entered by or on behalf of the defendants. The learned judge, doubting the applicability of the Common Law Procedure Act to the case of a foreign corporation carrying on business out of the jurisdiction, declined to make any order, but referred the plaintiffs to the court.

Honyman now moved accordingly.—The plaintiffs are entitled to proceed under the statute, unless there be some rule of law which prevents its application to a foreign corporation. [BYLES, J.—I doubted, and I still doubt, whether the 16th section of the act can apply to a foreign corporation trading abroad. We have no means of knowing the constitution and attributes of such a body. It may be altogether different from our incorporated companies. For anything we know, each *member may be personally liable. Besides, it does not appear that the secretary, upon whom the notice was served, is a member of the corporation.] The company have addressed to the officer of this court a protest against the proceedings: it is clear, therefore, that the notice has come to their hands. The 16th section of the Common Law Procedure Act, 1852, provides that "every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary of such corporation." [WILLES, J.—The 17th and 18th sections were introduced as a substitute for the old proceeding to outlawry, which could only be against natural persons. The 19th section speaks of "persons *residing* out of the jurisdiction." The language of the 16th section is clearly applicable to domestic corporations.] By s. 227 (the interpretation clause) "persons and parties" include corporations. In Boyd *v.* The Croydon Railway Company, 4 N. C. 669 (E. C. L. R. vol. 33), 6 Scott 461, where a railway act provided that no action should be brought against any *person* for anything done in pursuance of the act, without twenty days' notice given to the intended defendant, it was held that the word *person* included the company. [WILLIAMS, J.—The spirit of the thing is, that there must be personal service or something that is equivalent to it. You are driven back to the 16th section; and that does not apply to foreign corporations. COCKBURN, C. J.—Before we can give leave to proceed, we must be satisfied that this jurisdiction, which is a new creation, applies to foreign corporations. The object of these sections, as my Brother Willes observes, was, to give a substitute for outlawry. I do not think there exists abroad such a thing as a corporation for trading purposes in the sense in which we understand it.] Foreign corporations have been allowed to sue in this country in their corporate *names: The Dutch West India Company *v.* Van Moses, 1 Stra. 612, 2 Lord Raym. 1532; The National Bank of St. Charles *v.* De Bernales, R. & M. 190 (E. C. L. R. vol. 21), 1 C. & P. 569 (E. C. L. R. vol. 12). [WILLIAMS, J.—As plaintiffs, but not as defendants. WILLES, J.—The earliest reported case of an action by a foreign corporation probably is that of The Dutch East India Com-

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pany *v.* Henriques, Resp. Pr. C. P. (by Sir G. Coke) 44. WILLIAMS, J.—Before the passing of the Common Law Procedure Act, there clearly was no mode of suing in this country foreigners residing abroad. That power is now given, in a mode that is pointed out. We cannot, if that is inapplicable to the case, sanction any other mode. WILLES, J.—In the Irish statutes, 43 G. 3, c. 53, and 13 & 14 Vict. c. 18, there are express provisions for the service of process upon foreign corporations: see Sheehy *v.* The Professional Life Assurance Company, 2 C. B. (N. S.) 211 (E. C. L. R. vol. 89), 3 C. B. (N. S.) 597 (E. C. L. R. vol. 91).]

COCKBURN, C. J.—I think there ought to be no rule in this case, simply upon the ground that the 18th and 19th sections of the Common Law Procedure Act, 1852, relating to the service of process upon persons residing out of the jurisdiction of the superior courts of this country, do not apply to the case of foreign corporations. The 16th section clearly applies only to corporate bodies in this country. All the preceding sections relate exclusively to persons resident within the jurisdiction. The 18th and 19th sections relate to British subjects and foreigners resident in foreign parts. Looking at what the law was before the passing of this act, it seems to me to be perfectly clear that these provisions refer only to individual defendants, and not to corporations. Assuming, therefore, that this company is sufficiently shown to be a corporation aggregate, capable of suing and being sued in its corporate name, I think it is enough to say that the provisions in question do not apply to such a case.

*710] *WILLIAMS, J.—It is clear to my mind that the 18th and 19th sections do not apply to foreign corporations. Throughout the clauses, personal service, or something tantamount to it, is talked of: and this there are no means of effecting in the case of a foreign corporation.

The rest of the court concurring, Rule refused.

It is generally held in the United States that foreign attachment or trustee process will lie against a corporation created by the laws of another state, and that such corporations are included within the general denomination of "any person or persons," in statutory provisions authorizing that form of procedure: Bushell *v.* Commonwealth Ins. Co., 15 Sergeant & Rawle 173; Planters' & Merchants' Bank *v.* Andrews, 8 Porter, Alab. 404; Union Bank *v.* U. S. Bank, 4 Humphreys 369; South Carolina Railroad Co. *v.* M'Donald, 5 Georgia 531; Libbey *v.* Hodgdon, 9 New Hamp. 394; Martin *v.* Branch Bank, 14 Louisiana 415; U. S. Bank *v.* Merchants' Bank, 1 Robinson (Va.) 573: but see contra, M'Quean *v.* Middletown Manufact. Co., 16 Johns. 5.

In many of the states there are statutes which expressly authorize the service of process on the agents of foreign corporations. See in Pennsylvania Bright. Purd. 168, pl. 32, &c.: and see Moulin *v.* Trenton Insurance Co., 1 Dutcher 57.

FERRAND and Others *v.* BISCHOFFSHEIM and Others. *June* 4.

To a declaration for money paid, money received, &c., the defendants pleaded that they at the request and with the consent of the plaintiffs dealt with and treated one F. as the principal in the transaction in respect of which the moneys were received by the defendants, and as the party with whom alone they were dealing; that the plaintiffs further authorized and requested the defendants to receive any moneys resulting from the transaction on account of and as the moneys of F., and on the terms that the defendants might deal with such moneys as the moneys of F.: Averment, that the moneys, being the moneys resulting from the said transaction, were afterwards, in pursuance of the said request, authority, and consent of the plaintiffs, received by the defendants in respect of and as the result of the said transaction, and on account of and as the moneys of F.; that, upon the faith and in consequence of the said request, authority, and consent of the plaintiffs, the defendants afterwards gave credit to F. in respect of divers other transactions, and were induced to allow F. to incur debts to them which were still due; and that, before and at the time when the said moneys were so received by the defendants as aforesaid, on account of and as the moneys of F., he the said F. was, and still remained, indebted to the defendants for and in respect of the debts thereinbefore mentioned, in an amount equal to the plaintiffs' claim,—which amount the defendants were willing to set off:—Held, bad, on demurrer.

THIS was an action for money paid, money received, and money found due upon accounts stated.

The defendants pleaded, secondly,—as to 1207*l.* 18*s.* 2*d.*, parcel of the moneys alleged to have been received by the defendants for the use of the plaintiffs,—that they, the defendants, at the request and with the consent of the plaintiffs, dealt with and treated one Octave Foa as the principal in the transaction in respect of which the said moneys in the introductory part of that plea mentioned and therein pleaded to were received by the defendants, and as the party with whom alone they were dealing; and that the plaintiffs then and at *the time of making the said request further authorized and requested the [*711 defendants to receive any moneys resulting from the said transaction on account of and as the moneys of the said Octave Foa, and on the terms that the defendants might deal with such moneys as the moneys of the said Octave Foa: That the said moneys therein pleaded to, being the moneys resulting from the said transaction, were afterwards, and before the commencement of this suit, and in pursuance of the said request, authority, and consent of the plaintiffs as aforesaid, received by the defendants in respect of and as the result of the said transaction, and on account of and as the moneys of the said Octave Foa, and on the terms aforesaid: That, upon the faith and in consequence of the said request, authority, and consent of the plaintiffs as aforesaid, and upon the faith that they the defendants should so receive on account of and as the moneys of the said Octave Foa the moneys resulting from the said transaction, according to and in pursuance of the said request, authority, and consent of the plaintiffs in that behalf, they, the defendants, afterwards, and before the commencement of this suit, trusted and gave credit to the said Octave Foa in respect of divers other transactions; and that they, the defendants, were afterwards and before the commencement of this suit, whilst the said request, authority, and consent of the plaintiffs continued in full force and effect, and before any revocation thereof by the plaintiffs, induced to and did allow and permit the said Octave Foa to incur divers debts to them, and to become liable to them in respect of such debts, and which debts from the said Octave Foa to the defendants were still due and owing and unpaid, upon

the full faith and in consequence of the said request, authority, and consent of the plaintiffs, and upon the faith that the moneys resulting
*712] from the first-mentioned *transaction should be received by them the defendants on account of and as the moneys of the said Octave Foa as aforesaid, in pursuance of and according to the request, authority, and consent of the plaintiffs as aforesaid: And that, before and at the time when the said moneys were so received by the defendants as aforesaid on account of and as the moneys of the said Octave Foa, the said Octave Foa was, and thence hitherto had been, and still was, indebted to the defendants, for and in respect of the divers debts thereinbefore mentioned as incurred by the said Octave Foa, in an amount equal to the plaintiffs' claim therein pleaded to, for money payable by the said Octave Foa to the defendants, for money paid by the defendants to and for the use of the said Octave Foa at his request, and for money received by the said Octave Foa for the use of the defendants, and for money found to be due from the said Octave Foa to the defendants on accounts stated between them, which amount the defendants were willing to set off against the plaintiffs' claim therein pleaded to.

Archibald, in support of the demurrer.—The plea is clearly bad. In the first place, it does not show any consent on the part of the plaintiffs to the receipt of this money as money of Foa; neither does it show any ground upon which the defendants are entitled to the set-off they claim. The plea states that the defendants at the request and with the consent of the plaintiffs dealt with Foa as principal in the transaction. It is clear that the defendants were throughout aware that there was a principal, who might at any time have intervened; and therefore there is nothing to bring the case within the principle of George *v.* Clagett, 7 T. R. 359, and Rabone *v.* Williams, 2 Stra. 1182. In the last-mentioned
*713] case, Lord Mansfield says: "Where *a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." Fish *v.* Kempton, 7 C. B. 687 (E. C. L. R. vol. 62), is precisely in point: it was there held, that, where A. buys goods of B., knowing that B. is selling them as factor, he cannot, in an action by the principal for the price, set off a debt due to him from B., although it is found that A. made the purchase bonâ fide. [BYLES, J.—Would *payment* to Foa have been good?] Payment stands upon a totally different footing from set-off: Warner *v.* M'Kay, 1 M. & W. 591.†(*a*) [COCKBURN, C. J.—Payment to the agent would be payment to the principal. BYLES, J.—You may perhaps say that "deal with him as principal" means no more than "pay him."] Exactly so. In Fish *v.* Kempton, Williams, J., says that "the doctrine of George *v.* Clagett, and that class of cases, has no application where the buyer knows that the factor sells as factor." And Wilde, C. J., says: "Where a factor sells, with notice to the vendee that he sells as factor, *payment* to him is good, even though made prematurely; but the vendee cannot, under

(*a*) Cited in Fish *v.* Kempton, 7 C. B. 687 (E. C. L. R. vol. 62), and observed upon in Smart *v.* Sandars, 3 C. B. 399 (E. C. L. R. vol. 54).

such circumstances, claim a right of set-off." In Carr *v.* Hinchliff, 4 B. & C. 547 (E. C. L. R. vol. 10), 7 D. & R. 42 (E. C. L. R. vol. 16), the plea stated, that the goods were sold and delivered to the defendant by A., the factor and agent of the plaintiff, with the privity of the plaintiff, as and for the goods of A., and *that the defendant did not know that the goods were the property of A.; that, at the [*714 time of the sale and delivery, A. was and still is indebted to the defendant in more than the value of the goods; and that the defendant was ready and willing to set off and allow to the plaintiff the value of the goods, out of the moneys so due and owing from A. [BYLES, J.—The plea in this case is open to this further observation, that the new debts are not alleged to equal in amount the debts sued for, and the old debts were not incurred upon the faith of the alleged request.]

Holland, contrà, was called upon to support the plea. If the present case can be brought within the principle of George *v.* Clagett, the defendants may set off any claim they have. [COCKBURN, C. J.—The plea is, to say the least of it, very ambiguous.] This is very like the case of Stracey *v.* Deey, note to George *v.* Clagett. That was assumpsit for goods sold: pleas, non assumpsit and a set-off. The plaintiffs jointly carried on trade as grocers, but Ross was the only ostensible person engaged in the business, and appeared to the world as solely interested therein. By the terms of the partnership, Ross was to be the apparent trader, and the others were to remain mere sleeping partners. The defendant was a policy-broker, and, being indebted for grocery (as he conceived) to Ross, he effected insurances and paid premiums on account of Ross solely, to the amount of his debt, under the idea that one demand might be set off against the other. Ross's affairs being much deranged, payment of the money due from the defendant was demanded by the firm, and was refused by him upon the ground of his having been deceived by the other partners keeping back and holding out Ross as the only person concerned in the trade. Lord Kenyon *was of opinion, that, as the defendant had a good defence by [*715 way of set-off as against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not now pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the parties the same advantages and equities in their defence that they would have had in actions brought by Ross. [BYLES, J.—There, there was an absence of knowledge on the part of the defendant that he was dealing with any other than Ross.] The averment of a request is tantamount to an averment of want of knowledge. [WILLIAMS, J.—Is there any case to show that the defendants may rely upon a set-off in respect of a debt existing at the time of the dealing with the agent as principal? Is it not confined to transactions between the time of so dealing with him and the time of suing?] The defendants are entitled to be placed in the same situation as if Foa were the party suing. In Smith's Mercantile Law, 5th edit. 163, it is said: "The principal's right to enforce contracts made by his agent is subject to this rule, viz. that, if the agent have been allowed to deal in his own name, the party dealing with him will enjoy the same rights against the employer as he might have exercised against his agent had that agent really been a principal. Thus, when

a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes the principal; and, though the real principal may appear and bring an action on that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. This rule is to prevent the hardship under which a purchaser would *716] labour, if, *after having been induced by peculiar considerations, such, for instance, as the consciousness of possessing a set-off, to deal with one man, he could be turned over and made liable to another, to whom those considerations would not apply, and with whom he would not willingly have contracted. But if, at any time in the course of the transaction, he have means of knowing that the person with whom he deals is not a principal, the above reason does not apply, and then cessante ratione cessat ipsa lex." Words and conduct are put upon the same footing, according to the well-known doctrine of Pickard v. Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488, and Freeman v. Cooke, 2 Exch. 654.† In Heald v. Kenworthy, 10 Exch. 739, 746,† Parke, B., says: "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be unjust for him to do so." Whether, therefore, by special request, or by mere standing by, the defendant has been induced to deal with the agent as principal, he is entitled to all the equities he would have been entitled to as against the agent. The plea is intended to state, that, before the moneys were received from Foa, the defendants had, in consequence of the plaintiffs' request, permitted Foa to incur debts to them. It is at all events good as an argumentative plea of not guilty. [WILLES, J.—It must be an argument excluding every supposable case in which the plaintiffs would be entitled to recover.] Argumentativeness was the objection urged *717] against the plea in Carr v. Hinchliff. [COCKBURN, C. J.—It is *clear that if the principal represents the agent as principal, he is bound by that representation. So, if he stands by and allows a third person innocently to treat with the agent as principal, he cannot afterwards turn round, and sue him in his own name. The present is a third case: the plaintiffs request the defendants to deal with Foa as principal; must not that mean, as principal *in that transaction?*] If the plaintiffs had intended so to limit it, they should have taken care to do so. If the court entertain any serious doubt, the defendants will crave leave to amend the plea by confining the set-off to debts incurred with them by Foa after the plaintiffs' request and consent to their treating him as principal.

COCKBURN, C. J.—As the plea stands, it is clearly bad. It is not enough to say that the defendants at the request and with the consent of the plaintiffs dealt with and treated Foa as principal in the transaction; it must go further, and aver that the plaintiffs authorized the defendants to treat the moneys as moneys of Foa.

WILLIAMS, J.—I also think the plea bad: and I do not say that it will be good with the proposed amendment.

Leave to amend, the plaintiffs' costs to be costs in the cause.

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*In the Matter of an Action or Suit pending in the County Court of LANCASHIRE holden at LIVERPOOL, Between GEORGE HOEY and Others and JOHN M'FARLANE and Others. [*718

June 9.

The county court has, by the 18 & 19 Vict. c. 63, ss. 40, 41, 42, jurisdiction to determine a dispute between the committee of management of a friendly society and any of its members, as to the propriety of the mode of convening and the manner and place of holding special general meetings for the purpose of altering or amending the rules of the society.

A plaint was heard before a deputy-judge of a county court, and he, after the death of the judge whose deputy he was, sent a written statement of his decision to the late judge's successor, who received and entered it as his judgment. The court (without expressly deciding that the judgment so entered was void) granted a rule nisi for a prohibition against proceeding upon it, in order to give the parties an opportunity of applying to the new judge for a rehearing.

AT a meeting of a committee of members of a society called The Liverpool United Legal Friendly Burial Society, nominated at a general meeting of the society held on the 13th of June, 1856, certain rules were adopted, and were afterwards duly certified by the registrar of friendly societies.

In the month of January, 1857, certain alterations in and additions to the said rules were deemed advisable for the better and more effectual management of the society, and for enlarging the payments for the funerals of the deceased members; and the defendants, who were the committee of management, caused to be issued and duly advertised and placarded a notice convening a general meeting of the society in accordance with the 111th rule,(*a*) which notice was as follows:—

*"To the members of the Liverpool United Legal Friendly Burial Society:— [*719

"A special general meeting of the members of the society will be held in the Clarendon Rooms, South John Street, Liverpool, on Thursday, the 5th of March, 1857, at three o'clock in the afternoon, for the purpose of obtaining the consent of a majority of the members present at such meeting to rescinding some of the present rules of the society, and to the making and passing certain new rules, and also for making and passing certain amendments and alterations in the present rules.

"The following are the numbers of the present rules proposed to be altered and amended:—2, 5, 6, 10, 13, 14, 16, 21, 26, 34, 35, 36, 42, 47, 63, 74, 75, 77, 83, 84, 85, 90, 95, 101, 102, 106, 111, 113.

"The substance of the proposed alterations and amendments is as follows:—Place of meeting, how removed,—extending age for the admission of members,—raising of the funeral money,—election of com-

(*a*) The 111th section provided "that notices of all meetings shall be conspicuously posted by placards through the borough, and shall be inserted in six at least of the Liverpool newspapers, commencing not later than one week before the day of meeting; and such notices shall (in case of special meetings) contain the substance of the proposals to be made thereat, and shall be deemed sufficient to convene any meeting of members."

mittee,—persons present at committee meetings,—persons eligible to hold office,—officers in case of death, removal, or resignation,—increase of collectors, and allowance,—half yearly balance-sheets, instead of yearly,—notices of meetings, and how called,—with other minor alterations.

"Proposed rules to be expunged,—3, 15, 37, 61, 64, 69, 70, 79, 96, 109, 115.

"Substance of ten proposed new rules:—Members from 45 to 75 paying half-subscription to receive half benefit,—hours for paying funeral money,—persons eligible to be members,—members transferring from other societies,—officers under control of committee of management,—members of committee to be elected annually.

"By order of the committee of management,

"Feb. 24, 1857. "W. JENKINS, Sec."

*720] *The meeting was held at the time and place mentioned in the notice; and there was ample room for all the members who attended; and a full opportunity was afforded to every member who came to the meeting of taking part in the proceedings. No member had occasion to complain of want of room, or of being unable to obtain admission. Resolutions were passed by a large majority of the members at the meeting, authorizing divers alterations in the subsisting rules, and additions thereto, but all of them within the scope of the notice, and fairly and bonâ fide indicated thereby.

The plaintiffs, without any previous complaint made to the committee, and without giving them any notice of their objections, on the 29th of June, 1857, issued a plaint or summons in the Liverpool County Court, to which were appended the following particulars of complaint:—

"This is a case under the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), and the following are the particulars of the complaint of the above-named plaintiffs:—

"1. That the defendants are the committee of management of 'The Liverpool United Legal Friendly Burial Society,' the rules whereof have been duly certified under 'An act to consolidate and amend the law relating to friendly societies, passed in the 18th and 19th years of the reign of Her present Majesty."

"2. That the plaintiffs are members of the said society, and interested in the matters of this action.

"3. That the 116th section of the said rules provides 'That no new rule shall be made, nor any of the rules herein contained, or hereafter to be made, shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting of the society specially called for that purpose.'

*721] *"4. That the 105th of the said rules provides that 'all meetings of the members shall be held in some convenient place in the borough of Liverpool, subject to the rules in that behalf provided.'

"5. That the 111th of the said rules provides that 'notices of all meetings shall be conspicuously posted by placard through the borough, and shall be inserted in six at least of the Liverpool newspapers, commencing not later than one week before the day of meeting; and such notices shall (in case of special meetings) contain the substance of the proposals to be made thereat.'

"6. That the said society consists of 30,000 to 40,000 members, who

are principally working men, their wives and children; and the adults in benefit, and entitled to attend and vote at public meetings of members, number about 15,000.

"7. That the defendants, as such committee as aforesaid, recently called a special general meeting of members to appoint a committee to alter the existing rules of the society, and to pass new ones, although no such committee could be appointed by virtue of the said rules of the society.

"8. That the defendants afterwards called a special meeting of the members to be held at the Clarendon Rooms in Liverpool aforesaid, although the place is capable of holding about one hundred persons only.

"9. That the plaintiffs protested against such meeting and the proposed alteration of the rules; but the defendants proceeded with the meeting, and submitted divers new rules and alterations, some whereof were contrary to law.

"10. That the defendants subsequently called another meeting at the same place, and certain alterations in the existing rules, and additions thereto, were passed *by the persons then assembled; but the registrar has not certified the same. [*722

"11. The plaintiffs charge that the notices calling the said meetings do not, nor does any one of them, contain the substance of the proposals to be made at the said meetings, within the meaning of the said 111th rule; and that the place of meeting aforesaid was not a 'convenient place,' within the meaning of the said 105th rule.

"12. That the defendants have wilfully, corruptly, and improperly sought to alter the existing rules of the society, and have expended divers large sums of the society's money in and about the said meetings and amendments and alterations, for printing, advertising, deputations to London, and other things, and certain moneys are still owing in respect thereof.

"The plaintiffs seek an order of this honourable court, that the said meetings may be declared void and of no effect; that the defendants may be restrained by the injunction of this honourable court from procuring the certificate of the registrar of friendly societies in England that the said proposed alterations and amendments are according to law, and from taking any steps or proceedings for procuring or obtaining such certificate, and from putting in force or acting upon the said alterations and amendments, until the said 111th rule has been duly complied with in regard thereto; that the defendants be ordered to repay the trustees of and for the use of the society all such moneys as have been expended by the defendants out of the funds of the said society as aforesaid; and, for this purpose, if necessary, that an account thereof may be taken; and that they may be restrained from paying out of the funds of the society the moneys still owing as aforesaid; and that the defendants may be also ordered personally to bear their costs of and incidental to the present *proceedings, and to pay the plaintiffs their costs of and incidental thereto. [*723

"The plaintiffs also seek such further or other relief as the circumstances of the case may require, and the court may be pleased to grant."

The hearing was adjourned, and the cause was ultimately tried on the 25th of August, 1857, before J. S. T. Greene, Esq., a judge of one of the county courts of Lancashire, in the place of Joseph Pollock, Esq.,

the then judge of the Liverpool county court, *but who resigned before judgment was delivered therein.*

On the 18th of November last, the said J. S. T. Greene sent the following written order,—and no other order or judgment in the cause had been made or given :—

"In the Matter of the Liverpool United Legal Friendly Burial Society.

"I find that the proposed alterations and alleged amendments in the rules of the said society whereof complaint is made in and by the plaint entered in this court, and bearing date the 20th of June, 1857, were not and have not been duly and regularly made and passed, and that they are and were from the alleged time of making and passing thereof altogether null and void; and I direct that the same shall be no further proceeded with nor in any way attempted to be acted upon by the said defendants: And I order and direct that the business and affairs of the said society shall be conducted by the said defendants in this suit, and all and every other the officers and members of the society, according to the existing rules certified by the registrar of friendly societies in England, and in force at the hearing of this suit, until such rules shall be lawfully altered or rescinded.

"And I further order the said defendants to deliver into the office of
*724] the registrar of the court, within *twenty-eight days from the date hereof, a full and true account of all moneys which have been paid and disbursed, or detained or retained by them for that purpose, out of the funds of the society, in or on account of their costs and expenses incurred in defending this suit: and I direct the said registrar to ascertain the amount: and I do order that such moneys shall be paid by the said defendants into this court for the benefit of the said society, to be received by the officers thereof duly authorized in that behalf; and, in default of the said defendants delivering and bringing into the office of the registrar such accounts as aforesaid, then I order that the said defendants shall pay the sum of 50*l.* for the benefit of the said society, to be paid over as aforesaid.

"And I further order that the defendants shall pay to the said plaintiffs the costs which have been incurred by them in the prosecution of this suit, to be taxed," &c.

Upon an affidavit setting forth the above facts, and further stating that none of the managing committee had ever used or appropriated any of the funds of the said society for their own use, or had ever been indebted to the said society on any account whatever, but had in all things connected with their office acted fairly and bonâ fide to the best of their judgment and belief for the benefit of the said society, and believed the said alterations and amendments would have been conducive to the interests thereof; and that alterations and amendments for the extension of the funeral allowances on the decease of members were still essential to be made, to enable the society to compete with other societies of a similar character, who were paying higher rates, with no larger amount of subscription,—

*725] *Brett* moved for a rule to show cause why a writ of *prohibition should not issue to the county court of Liverpool, to prohibit all further proceedings in the said court against the defendants upon the above judgment.—This was a matter in which the county court had no

jurisdiction; and, if the county court had jurisdiction, it has not been well exercised. The sections of the statute 18 & 19 Vict. c. 63, which give jurisdiction to the county court in matters relating to friendly societies, are the 41st and 42d. The 41st section enacts, that, in all friendly societies established under this act or any of the repealed acts, all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made by the member or person claiming through or under a member or under the rules of the society, shall be made to the county court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the Court of Chancery in respect either of its ordinary or its special or statutory jurisdiction; and the decision of such county court upon and in relation to such application as aforesaid shall not be subject to any appeal." And the 42d section enacts, that, "in all cases where the order of such county court shall be for the payment of money, the *same may [*726 be enforced in the same manner as the ordinary judgments of such court are enforced; but, where the order of the said court shall be for the doing of some act, not being for the payment of money, it shall be lawful for the judge of such county court in his said order to order the party to do such act, or that, in default of his doing it, he shall pay a certain sum of money; and, in case he refuse or neglect to do the act required, upon demand in that behalf, the sum of money or penalty in the said order may then be recovered in the same manner as a judgment for debt or damages in such court; and it shall not be lawful to remove the same by certiorari or other writ or process to any superior court of record." The 25th section provides for the making of rules, which by s. 26 are to be certified by the registrar of friendly societies. The 27th section enacts, that, "after the rules of a friendly society shall have been certified by the registrar as aforesaid, it shall be lawful for such society, by resolution at a meeting specially called for that purpose, to alter, amend, or rescind the same or any of them, or to make new rules:" it then provides for the transmission of such amended rules to the registrar, and declares, that, "if the said registrar shall find that such alterations, amendments, or new rules are in conformity with law, he shall give to the society a certificate, &c.; and that all rules, alterations, and amendments, when so certified as aforesaid, shall be binding on the several members of the said society and all persons claiming on account of a member or under the said rules; but, unless and until the same shall be so certified as aforesaid, such rules, alterations, and amendments shall have no force or validity whatsoever." The registrar under these sections is the proper person to determine whether the rules, or any alterations or amendments thereof, have been made in conformity with

*727] law. The *plaint asks that an order may be made that the meetings held pursuant to the notice of the 24th of February, 1857, might be declared void and of no effect, that the defendants (the committee of management of the society) might be restrained from procuring the certificate of the registrar that the proposed alterations and amendments were according to law, and from putting in force or acting upon such alterations and amendments until the 111th rule had been duly complied with in regard thereto; and that the defendants be ordered to repay to the trustees all such moneys as had been expended by them out of the funds of the society in reference to the proceedings. The judge finds that the proposed alterations and alleged amendments in the rules had not been duly and regularly made and passed, and that they were altogether null and void; and he directs "that the same shall be no further proceeded with, nor in any way attempted to be acted upon by the defendants;" and he further orders and directs "that the business and affairs of the said society shall be conducted by the defendants and all and every other the officers and members of the society according to the existing rules certified by the registrar of friendly societies in England and in force at the time of the hearing of this suit, until such rules shall be lawfully altered or rescinded." This clearly was assuming a jurisdiction which the statute does not confer upon the county court. The judge had no power to dictate to the committee the mode in which they were to carry on the business of the society. [WILLIAMS, J.—That part of the order is only a periphrastical way of saying that the former rules shall continue in force. COCKBURN, C. J.—Suppose the meeting at which the alterations were made had been improperly convened, and held at an inconvenient place, do you contend *728] that the judge of *the county court had no jurisdiction?] The county court has only an equitable jurisdiction under ss. 41 and 42 to order the parties to do some act: it has no power to order an injunction or a prohibition to control the committee in their management of the affairs of the society. [BYLES, J.—The 41st section gives the most ample jurisdiction to the county court to entertain "all applications for the removal of any trustee, or *for any other relief, order, or direction*," &c.] The 42d section qualifies those general expressions. [BYLES, J.—The 42d section is cumulative on the 41st: the two sections together give the county court all the jurisdiction which the Court of Chancery had, and some powers which that court had not. WILLIAMS, J.—It can hardly be contended that the registrar of friendly societies has power to deal with matters of this sort: and, if the county court has not, there is no power vested anywhere for the purpose.]

Assuming that the county court had jurisdiction, such jurisdiction, it is submitted, has not been properly exercised. The plaint was heard by Mr. Greene, who was acting as deputy for Mr. Pollock, the judge of the Liverpool County Court, on the 13th of July, 1857; and the order was not made until the 18th of November, after the resignation and death of Mr. Pollock, and the appointment of Mr. Blair as his successor. The power of the deputy judge is regulated by the 20th section of the 9 & 10 Vict. c. 95, and the 11th section of the 19 and 20 Vict. c. 108. The former enacts, that, in case of illness or unavoidable absence, the cause whereof shall be entered on the minutes of the court, it shall be lawful for the judge, or, in case of the inability of the judge to make

such appointment, for the Lord Chancellor (or chancellor of the Duchy of Lancaster) to appoint some other (qualified) person to act for him for any time or times not exceeding in the *whole two calendar [*729 months in any consecutive period of twelve calendar months. And the latter provides that the appointment of a deputy of a judge of a county court, whether such deputy shall have been appointed by the judge, or by the Lord Chancellor, or by the chancellor of the Duchy of Lancaster, shall not be vacated by the death of the judge; but his acts done after such death shall be as valid as if the judge had not died; and he shall continue to act in all the courts of the district of which the deceased was judge, "until the Lord Chancellor, or, where the whole of such district is within the Duchy of Lancaster, until the chancellor of the Duchy, shall otherwise order, or a successor to such judge shall be appointed," &c. Here, Mr. Greene, who heard the case, and therefore whose mind was to be applied to the decision, sent that which purports to be an order to Mr. Blair, who was appointed to succeed Mr. Pollock as judge of the county court, and who received and recorded it as the judgment of the court, after the death of that gentleman. [COCKBURN, C. J.—It is, in effect, a judgment of the court without a hearing. The question is whether it was not the duty of the defendants, under the circumstances, to apply for a rehearing.] The judgment is a nullity.

Mellish, contrà.—The 41st and 42d sections of the 18 & 19 Vict. c. 63, confer upon the county court all the powers of dealing with friendly societies which the Court of Chancery possessed before, and something more. And it is clear that a court of equity might have granted an injunction in such a case as this: Ward *v.* The Society of Attorneys, 1 Collier C. C. 370. [COCKBURN, C. J.—Upon the question of jurisdiction, the court entertain no doubt. The only difficulty we feel is, whether the judgment of the deputy can stand.] *The judgment is the [*730 judgment of the court,—of the new judge. The declaration of the reasons upon which it is founded forms no part of the judgment. Assuming, therefore, that Mr. Blair, the new judge, has entered the judgment, and will act upon it, the question is whether it is so contrary to natural justice to enter and to enforce a judgment upon a hearing before a deputy who was properly qualified at the time of the hearing, as to induce this court to interpose. This court will only prohibit the county court from doing that which is clearly beyond its jurisdiction: In re Walsh, 1 Ellis & B. 383 (E. C. L. R. vol. 72). Supposing, therefore, Mr. Blair is prohibited, it would only be to restrain him from enforcing Mr. Greene's judgment,—not to prohibit him from proceeding upon the plaint generally: and time might now be given to the parties to apply for a rehearing.

COCKBURN, C. J.—As to the first point, I am clearly of opinion that the county court has jurisdiction in the matter in question. The statute gives the county court the largest powers in reference to disputes amongst members of these friendly societies. The 40th section enacts that "every dispute between any member or members of any society established under that act or any of the acts thereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, should be decided in manner directed by the rules of such society, and

the decision so made should be binding and conclusive on all parties, without appeal: provided, that where the rules of any society established under any of the acts thereby repealed should have directed disputes to be referred to justices, such disputes should be referred to
*731] and decided by the county court, as thereinafter mentioned." In *addition to these general terms giving jurisdiction, the 41st section enacts that, "in all friendly societies established under this act or any of the repealed acts, all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society, the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators, within forty days after application has been made by the member, or person claiming through or under a member, or under the rules of the society, shall be made to the county court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the Court of Chancery in respect either of its ordinary or its special or statutory jurisdiction; and the decision of such county court upon and in relation to such application as aforesaid shall not be subject to any appeal." I cannot conceive what language the legislature could have employed in order to give more extensive powers. It is said that the general language of that section is controlled by that of the 42d section, which enacts, that, "in all cases where the order of such county court shall be for the payment of money, the same may be enforced in the same manner as the ordinary judgments of such court are enforced; but, where the order of the said court shall be for the doing of some act, not being for the payment of
*732] money, it shall be lawful for the judge of such county court in *his said order to order the party to do such act, or that, in default of his doing it, he shall pay a certain sum of money; and, in case he refuse or neglect to do the act required, upon demand in that behalf, the sum of money or penalty in the said order may then be recovered in the same manner as a judgment for debt or damages in such court; and it shall not be lawful to remove the same by certiorari or other writ or process to any superior court of record." It is said that this must be taken to limit the application of the former section to cases where the parties are ordered to do some act. That, however, would have the effect of nullifying the provisions of the statute in more than half the cases of disputes arising amongst these societies. Reading the two sections together, I cannot bring myself to doubt what ought to be the proper construction. It is plain to my mind that the county court had jurisdiction here. As to the other point, however, I entertain considerable doubt whether the present judge of the county court was right in entering as the judgment of the court the conclusion arrived at by Mr. Greene, whose functions as deputy to the late Mr. Pollock were at an end. It was the duty of the judge to "hear and determine" the matter of the plaint; and the question is, whether it is

not the duty of this court to prohibit the judge of the county court from determining without hearing. I think, therefore, it would be better to adopt the course suggested by Mr. *Mellish*, so as to allow the plaintiff an opportunity to apply to the court to have that order rescinded, and to proceed to a rehearing of the plaint.

WILLIAMS, J.—I am of the same opinion. I think it was quite within the jurisdiction of the county court to entertain the application and to make the order. It appears that a dispute arose here between the *committee of management and certain members of the society relative to the manner of convening, and the place of holding a special general meeting of the society for the purpose of altering and amending certain of its rules. The question is, how and before whom that dispute is to be settled. Mr. *Brett* says, by the registrar of friendly societies, under the 25th, 26th, and 27th sections of the 18 & 19 Vict. c. 63. That cannot be: all the duty intrusted to that officer is, to see that the rules which are submitted to him to certify are conformable to law: he has no power, as it seems to me, to inquire into the manner in which any alterations and amendments may have been made. Then it is said that the Court of Chancery is the proper tribunal. But I must say I am unable to discover any language in the statute which at all limits or controls the very general words of the 41st section. As to the other point, I must confess I see very considerable difficulty in it. I think the course which has been suggested is the course it would be advisable to adopt. I should be sorry to be supposed to lay it down as positive law, that, in all cases where the parties acquiesce in the adjournment of the decision by the deputy judge, and allow the judgment to be entered after the powers of the deputy are at an end, they can be permitted to come to the court and ask to have that judgment set aside on the ground that it was pronounced by an incompetent tribunal, without applying in the first instance to the judge. I think it would be very inconvenient to hold that that can be allowed. The difficulty, however, in the present case may be got over by giving the parties an opportunity of applying for a rehearing of the plaint. [*733

WILLES, J.—As to the main question, viz. whether the county court had jurisdiction to entertain this plaint, the conclusion I have arrived at is that it had. *The 41st section of the 18 & 19 Vict. c. 63, gives the county court jurisdiction, in very general terms, to deal with "all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or have arisen in any society the rules of which do not prescribe any other mode of settling such disputes," &c. If the first part of the 41st section had stood alone, there could have been no doubt of the power of the county court to dispense this specific relief. But then it goes on to provide that "such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or *as may now be given or made by the Court of Chancery, in respect either of its ordinary or its special or statutory jurisdiction.*" I doubted at first whether the Court of Chancery would make such an order as this, to enjoin the committee of management from acting upon the altered rules. But, upon the proper construction of the statute, it appears to me to have been [*734

intended to give jurisdiction to bring about the same result by making such an order as this. It is said that there are no means given to enforce the order when made, the 42d section only applying to a case where the party is ordered to pay money, or to do some act. The argument is plausible, but it will not hold. The 41st section determines the principles upon which the county court is to proceed: the 42d relates to mere matter of detail. But it appears to me that there are ample means of enforcing the orders of the county court. A power to enforce its orders is incident to every court: Viner's Abridgment, *Court* (F.). And, assuming that the 41st section of the statute did not carry with it the powers incident to the exercise of the jurisdiction *which *735] it creates, there would still be a remedy if the parties enjoined should neglect to obey the order of the court. An indictment might lie, as in the case of the disobedience of an order of justices, where the statute enabling the justices to make the order omits to provide means for the carrying of it out. I arrive at the conclusion that the jurisdiction exists, and that the county court is in this respect on the same footing as the Court of Chancery. Now, it was clearly within the jurisdiction of the Court of Chancery to interpose to prevent the majority from altering the constitution of the society. Ward *v.* The Society of Attorneys, 1 Collier, C. C. 370, is an authority for that. There, a society was incorporated by charter: the majority of its members having resolved to surrender their charter, with a view to obtain a new charter for an object different from that for which the original charter was obtained, an injunction was granted, upon the application of the minority, to restrain them from so doing. That case involves the principle upon which the county court attempted to proceed in this case. Therefore I concur with the rest of the court in thinking that a prohibition should not be granted upon that ground. There is, however, a more formidable objection, viz. that the order was made by the deputy judge after his deputation had ceased, after the death of the judge whose deputy he was, and after the appointment of a new judge. It is not, therefore, the judgment of a competent judge. To prove this it is only necessary to refer to the case of the Lord Chancellor retiring from office after the hearing of a cause, and before the judgment is pronounced. It was necessary to have recourse to the legislature to get rid of the difficulty arising from parties refusing to consent to judgment being pronounced at a subsequent period. Accordingly, by the 60th section of the 15 & 16 Vict. c. 80, reciting, *that "whereas, it has frequently *736] happened, that, after cases have been heard fully by the Lord Chancellor in the Court of Chancery, and are standing for judgment, the Lord Chancellor has delivered up the great seal without being able, by reason of other urgent public business, to deliver judgment therein, and much inconvenience and expense to the parties has been thereby occasioned," it is enacted, "that, in every such case, it shall be lawful for the person who has so delivered up the great seal, within six weeks after he shall have delivered up the same, to give in to the registrar of the said court a written judgment, signed by him; and a decree or order, as the case may require, shall be drawn up in pursuance of such judgment; and every such decree or order shall have the same force and effect as if the judgment in pursuance whereof it is drawn up had been given in open court the day before he shall have so delivered up the

great seal." It is unnecessary to refer to any other authority to show that this order cannot stand as the act of the deputy judge. But it is then said that it may stand as the judgment of the new judge. The objection to that is, that he had not heard the matter. It is said that the party complaining should have applied to the new judge for a rehearing. But I am not aware of any case in which that has been held to amount to a condonation, or that "mere standing by" has been thought to preclude the party from objecting to a defect of this sort. In my opinion, it is a fatal objection to the judgment, and I think a prohibition ought to issue for the purpose of preventing its being enforced. But, if we were to issue a prohibition, there might be a difficulty in the court's proceeding to another judgment in the same suit. The proper course, therefore, will be, to suspend this rule until the first day of the next term, in order to give the complainants an opportunity to *apply to the judge of the county court to strike out the judgment which has been entered per incuriam, and to proceed to a rehearing of the plaint. [*737

BYLES, J.—I am of the same opinion. What has been thrown out upon this occasion will afford a guide to the judge of the county court directing him to a right conclusion, provided the facts are not varied. I think it was perfectly competent to the county court to entertain and dispose of the matter of this plaint. In respect to associations of this description, the Court of Chancery is the natural jurisdiction in which to settle disputes amongst the members. But its machinery is cumbrous, expensive, and not readily accessible. I think it is impossible to read the 41st section of the 18 & 19 Vict. c. 63, without being satisfied that it was intended to make it unnecessary to resort to that jurisdiction, and to transfer all its powers to the county court. It enacts that "all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made by the member or person claiming through or under a member or under the rules of the society, shall be made to the county court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the Court of *Chancery in respect either of its ordinary or its special or statutory jurisdiction." It is impossible to conceive clearer terms giving the county court all the remedial powers previously possessed by the Court of Chancery. The 42d section, instead of controlling that section, appears to me to be cumulative, giving the county court a jurisdiction which the Court of Chancery did not possess. The first objection, therefore, affords no ground for a prohibition. For the reasons given by the rest of the court, however, I think the rule should go for the purpose already stated. Rule accordingly.(a) [*738

(a) See Hull v. M'Farlane, 2 C. B. N. S. 796 (E. C. L. R. vol. 89).

In the Matter of the Complaint of CHARLES COMPANY COOPER *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. *June* 1.

The South Western Railway Company had been in the habit of unloading goods coming by their railway from the Southampton Docks consigned to carriers in London, out of their trucks, and of placing them (by their servants) in or conveniently near to the wagons of the consignees, without any extra charge. This practice they discontinued, refusing to allow their servants to unload the trucks without an extra charge for such service,—except in the case of Messrs. Pickford, whose goods they continued to unload as before, the smallness of their quantity, and the fact of their being carried intermixed with the company's own traffic, rendering it (as the company alleged) more convenient to themselves so to do. C., however, another carrier, was denied the aid of the company's servants in the unloading of his goods of the same description, and coming from the same place,—the company alleging that the same reasons did not apply to his goods as to Messrs. Pickford's, inasmuch as the former came in large quantities, and in separate trucks.

The court refused to make absolute a rule for an injunction under the Railway Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining the company to unload the trucks containing C.'s goods, and to deliver such goods to C. by placing the same in or adjacent to his wagons,—holding the demand to be too large. But they intimated, that, if C.'s complaint had been confined to the company's giving an advantage to Messrs. Pickford in the unloading of their goods, which they withheld from him, C. might have been entitled to relief under the statute.

PEARCE, in Easter Term last, on behalf of Charles Company Cooper, obtained a rule calling upon the London and South Western Railway
*739] Company to show *cause why a writ of injunction should not issue against them, pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining them to unload the trucks or other conveyances of the said company containing goods consigned to him at their station situate at Nine Elms, Vauxhall, in the county of Surrey, and to deliver such goods to him by placing the same in or adjacent to the wagons or other conveyances of the said Charles Company Cooper which may be placed to receive the same at their said station, with costs.

An application had previously been made to Pollock, C. B., at Chambers, founded upon an affidavit of Cooper which was in substance as follows:—1. That I am a licensed carman and contractor for the carriage of goods, and I am to a considerable extent and almost daily employed as the consignee at Nine Elms for the conveyance of goods on their transit from the Southampton Docks to various parts of London, and which goods are forwarded by the said railway from Southampton Docks to Nine Elms: 2. That the company convey goods from the Southampton Docks to their station at Nine Elms at a charge of 13*s.* per ton for such goods as are classed under the rate No. 2 in their scale of charges: 3. That the company have until recently employed their own servants to unload the trucks or other conveyances containing goods consigned to persons at their station at Nine Elms, and delivered such goods to the consignees, by placing the same in or adjacent to the wagons or other conveyances of the consignees there to receive the same: 4. That I have recently had various lots of goods consigned to me from Southampton Docks to Nine Elms, on which the said charge of 13*s.* per ton has been paid for the carriage thereof, and the company refused and declined to unload the trucks and other conveyances containing the said goods as
*740] theretofore they had done as aforesaid, whereby I *am compelled to employ and do employ my own servants to unload such goods,

and to convey the same from the trucks or other conveyances of the company to my wagons or other conveyances: 5. That, since the said company have refused and declined to unload trucks and conveyances containing goods consigned to me, I have carefully watched and inquired whether the same rule is observed respecting goods consigned to other persons; and I say that the company still continue to unload the goods of other persons than myself at the Nine Elms station: 6. That by so doing the company give an undue or unreasonable preference or advantage to or in favour of such persons, and cause an undue and unreasonable prejudice or disadvantage to me: 7. That I am advised that the course pursued by the company is illegal and in contravention of the provisions of the Railway and Canal Traffic Act, 1854.

The application was opposed upon two affidavits of the superintendent of the goods department of the company at Nine Elms. The first of these was in substance as follows:—1. That Cooper was in the service of the company for about four years down to November, 1857, when he voluntarily quitted such service, and has since pursued the avocation of licensed carman of goods on his own account from the company's station at Nine Elms to different parts of London: 2. That the only dealings between the company and Cooper had been with respect to goods consigned to him by brokers at Southampton to Nine Elms, for delivery by him as such licensed carman in London, or goods consigned from Southampton, not in any name, but to wait the orders of merchants, which last-mentioned goods have only been delivered to Cooper upon production of a written order from authorized ship-brokers: 3. That, with regard to the company's charge of 13s. per ton for goods as mentioned in the second and *fourth paragraphs of Cooper's affidavit, I say that such charge is applicable only to the railway transit [*741 from the Southampton Docks to the Nine Elms station, and that the labour of transfer from the railway trucks to the company's vans for delivery is not included in that rate, but is charged for in an extra rate for delivery of dock goods to bonded or other warehouses in London: 4. That, prior to the time when Cooper quitted the company's service and embarked in his present avocation of carman as aforesaid, the delivery of goods from their station at Nine Elms was performed by the company themselves in their own vans, save and except the goods of Messrs. Pickford after mentioned: 5. That Cooper adds to the company's charge for carriage of goods an amount for London cartage to bonded warehouses or other places, which should include the labour of unloading and loading from the said company's trucks into his own vehicles, as is the case with respect to the extra rate charged by the company for cartage of goods delivered by them as aforesaid: 6. That the dealings of other parties with the company have no parallel with those of Cooper, except to a certain extent the dealings of Messrs. Pickford with the company as general carriers, to whom in that character goods are consigned for transit by the company's railway from Southampton, including consignments from the Southampton Docks, which they (Pickfords) transmit as consignors and consignees; but such consignments are composed generally of different classes of goods charged by the company at differential rates including labour in the transfer from the railway to vans for delivery: 7. That, in some instances, but not frequently, such last-mentioned consignments include goods arriving at Nine Elms from the

Southampton Docks on which the said rate of 13*s.* per ton is charged by
*742] the company for their transit on the railway, and *which goods the company transfer into the conveyances of Messrs. Pickford; but, although in this instance this is done, it is in point of fact a convenience to the company; such goods being mixed up with the company's traffic, owing to the quantity for the Messrs. Pickford not being sufficient to run a separate truck, and their goods are therefore placed in the same trucks which contain goods for the company's own delivery, whilst the traffic of Cooper is in almost all instances kept separate from the company's, and brought up in separate trucks: 8. That the company consider that they have a right, if they think proper, to withhold the labour of transfer with regard to such of Messrs. Pickford's goods upon which the rate of 13*s.* per ton only is paid for the carriage thereof: 9. That the company's wagons have always, without any intermission, so far as the general convenience of the public would permit, been placed in such an adjacent position at the station at Nine Elms as to facilitate the transfer of goods by Cooper from the railway wagons or trucks to his own vehicles: 10. That the charge of 13*s.* per ton for carriage of goods from Southampton Docks is about 6*s.* below the company's ordinary rate of charge for such class of goods; and, in cases where such ordinary or full rate is charged, the company include the labour of loading and unloading, but not otherwise: 11. That the contracts respecting the transmission of goods by the company which have been delivered to Cooper at their station at Nine Elms, and the rates and charges for the same, and the duties embraced therein, subsisted between the company and the senders of such goods; the only dealings between Cooper and the company immediately being limited to the receiving of the said goods at the station at Nine Elms by him as consignee or agent, for delivery by him in London in his own conveyances, in his character of licensed carman as aforesaid.

*743] *A further affidavit of the same deponent stated (2) that between the month of November, 1857, when Cooper commenced his dealings with the company, and the present time, the entire quantity of goods consigned to Messrs. Pickford from Southampton to Nine Elms, on which the dock rate of 13*s.* per ton was charged, as mentioned in the seventh paragraph of the former affidavit, was less than 21 tons; and that such goods arrived at Nine Elms in various trucks at various times, and the same were always, or nearly so, mixed up with the company's own traffic: 3. That it has been the practice of the company to transfer such last-mentioned goods to the vans of Messrs. Pickford, that course being the most convenient to the company with respect to such small quantities of goods as usually arrived on any one occasion intermixed as aforesaid with goods for delivery by the company, and the amount of time and trouble on the part of the company involved in such course of business not being greater than would be required in the checking the transfer of the same goods, if such transfer were effected by Messrs. Pickford's own carmen, and the security to the company being greater: 4. That, during the period before mentioned, from November, 1857, to the present time, the quantity of goods which arrived at Nine Elms from Southampton for delivery by Cooper, on which the dock rate of 13*s.* per ton was charged, amounted to upwards of 327 tons, and such goods commonly, if not always, arrived in sepa-

rate trucks: 5. And that about half only of the company's charges upon the said 327 tons of goods were paid by Cooper, the other moiety having been paid by the consignors.

The learned judge declined to entertain the matter, but referred the parties to the court.

In addition to the above affidavits, the motion was supported by another affidavit of the complainant, who *stated, that, whilst [*744 he was in the company's employ, the invariable practice of the company was that their servants should unload their trucks and place goods in the vans or other conveyances of the consignees, in respect of which goods the charge of 13*s.* per ton was charged by the company, and that no extra charge was made for so doing, and he believed that no new rule or regulation had been made on the subject: That, previously to the year 1853, Messrs. Smith & Dawes were the contractors for the delivery of goods from the Southampton Docks to London by the London and South Western Railway, and that the company always loaded and unloaded their trucks without making any extra charge for the same to Messrs. Smith & Dawes: That Messrs. Pickford are not the only parties for whom the company transfer goods into the party's own conveyances, for that they invariably unload their trucks containing goods of the description aforesaid for delivery to Messrs. Pope & Co., and place such goods in the vessels or other conveyances of the said Messrs. Pope & Co., and that such goods are of the same description as are classed under rate No. 2 in the scale of charges by the company charged at 13*s.* per ton: That the charge of 13*s.* per ton for the carriage of goods included under rate No. 2 is the highest rate of charges of the company for goods conveyed from the Southampton Docks to Nine Elms; and that the charges of the company for manufactured silk and fine goods from the Southampton Docks to Nine Elms, are respectively 11*s.*, 8*s.* 4*d.*, and 6*s.* 6*d.* per ton, including the loading and unloading of such goods into the wagons or conveyances of the consignees: And that three-fourths at least of the goods of the class aforesaid, and which have arrived at the Nine Elms station for delivery to Cooper, were consigned to him from the Southampton Docks.

Montague Smith, Q. C., and *Milward*, showed cause, *upon a [*745 further affidavit of the superintendent of the company's goods department, stating in substance as follows,—That it had not been the rule and invariable practice for the servants of the company to place goods in respect of which the dock rate of 13*s.* per ton was charged in the vans or other conveyances of consignees, but that the same had always been placed in such an adjacent position as the convenience of the traffic would allow, in order to facilitate the transfer of the goods to the conveyances of the consignees, as was the case with respect to the trucks containing goods arriving for Cooper; that Messrs. Smith & Dawes previously to the year 1853 were general carriers at Southampton and in London, and in such character did consign various classes of goods from Southampton to London, which were charged by the company at differential rates, including consignments at the dock rate of 13*s.* per ton, which last-mentioned goods were generally brought up in separate trucks, and were placed by the company in an adjacent position to the conveyances of the said Messrs. Smith & Dawes, and were then loaded into such conveyances by the servants of Messrs. Smith &

Dawes; that, with regard to goods consigned to Messrs. Pope & Co., nine-tenths thereof were a different class of goods and charged at a different rate to the dock rate, and that, by contract with the company, such goods were by the joint assistance of the servants of the company and of Messrs. Pope placed in barges brought alongside the wharf, but such barges were the only conveyances brought to Nine Elms by Messrs. Pope; that the company's ordinary rate for the same class of goods as those conveyed from Southampton Docks at 13*s.* per ton, if conveyed from any other place would be charged at a higher rate, in which charge the labour of transfer would be included; that, with respect to the rates
*746] of 11*s.*, 8*s.* 6*d.*, and 6*s.* 6*d.* per *ton mentioned in Cooper's affidavit, such rates had reference to different classes of goods to those conveyed at the dock rate, and that the goods charged at 11*s.*, 8*s.* 6*d.*, and 6*s.* 6*d.*, did not include silk or fine goods of any description; that, out of the 21 tons of goods which arrived at Nine Elms for Messrs. Pickford, at least seven-tenths thereof arrived mixed up with the company's traffic; and that nearly the whole of the 327 tons of goods which arrived at Nine Elms for delivery to Cooper arrived in separate trucks.

The learned counsel submitted that the rule was completely answered, the defendants' affidavits clearly showing, that, in unloading and delivering Messrs. Pickford's goods into their vans, the company were merely consulting their own convenience, the quantity of goods brought for Messrs. Pickford being small, and not brought, as the complainant's goods were, in separate trucks; and that, if this was intended to be complained of, the rule should have been differently framed, and should not have called upon the court to enjoin the company to unload and deliver the complainant's goods, but should have been confined to the enjoining them from doing in this respect for others that which they refused to do for the complainant.

Bovill, Q. C., and *Pearce*, in support of the rule.—It is not denied that the company decline to unload the trucks containing Mr. Cooper's goods, though they have hitherto been in the habit of doing so for others; and they admit that they still do so for Messrs. Pickford. The fact that the quantity of goods carried for Messrs. Pickford is inconsiderable as compared with that carried for Mr. Cooper in no degree varies the rights of the latter. The company are bound to treat all alike. [COCKBURN, C. J.—What power has this court under the statute
*747] to interfere respecting the mode of dealing with *the goods by the company after they arrive at their destination?] The goods have not arrived at their destination until they are delivered to the consignee,—into the wagon or carriage of the consignee: Richards *v.* The London, Brighton, and South Coast Railway Company, 7 C. B. 839 (E. C. L. R. vol. 62); Butcher *v.* The London and South Western Railway Company, 16 C. B. 13 (E. C. L. R. vol. 81). [WILLIAMS, J.—In those cases, the companies were held liable because they took upon themselves to deliver the goods into the passenger's carriage.] So here, the company took upon themselves to unload and deliver into the vans for Messrs. Pickford. If they do this for one, they must do it for all. At all events, Mr. Cooper has a right to complain that facilities are afforded to others which are withheld from him. [COCKBURN, C. J.—That is not the complaint he makes.] Substantially, it is submitted, it is so.

COCKBURN, C. J.—Looking at all the circumstances of the case, I am

of opinion that this rule must be discharged. I do not say that Mr. Cooper has not some ground of complaint against the company. It appears that the company, having formerly been in the habit of unloading goods brought by their railway from the Southampton Docks, out of their trucks into the wagons or other conveyances of the consignees, have recently established a new system, and have, in the case of the complainant, Mr. Cooper, declined to allow their servants to assist in unloading his goods from their trucks. It further appears, that, as regards Messrs. Pickford, the well-known carriers, the company have, notwithstanding this alteration in their general course of dealing, continued to allow their servants to unload their goods from the company's trucks and place them in Messrs. Pickford's vans, free of extra charge. At the same time, it appears that the quantity of goods of *the description in question which were brought up from Southampton for Messrs. Pickford is very small as compared with the quantity brought for the complainant. It further appears that the complainant, on being led to believe that this advantage which the company denied to him was continued to others, instead of remonstrating with the company, and resting his complaint upon this, the only true ground, based it upon the withdrawal of an advantage which had formerly been conceded. If Mr. Cooper had communicated to the company the real ground and nature of his complaint, it being unjust that the company should extend to a rival carrier an advantage which they do not extend to Mr. Cooper, even though the amount of such advantage should be comparatively small,—the company being bound to afford equal facilities and advantages to all, whether the quantity of goods carried be large or small,—we might have felt ourselves called upon so to mould the rule as to meet the particular case. It is one thing to say that the company shall not transfer from their trucks the comparatively small quantity of goods they bring from Messrs. Pickford into the vans of that firm: but it is a very different thing to say, that, because they do that for Messrs. Pickford, they shall be compelled also to unload and deliver into the complainant's wagons the large quantity which they bring for him. The rule, therefore, cannot be made absolute in the form in which it is moved. It asks more than is necessary to redress the grievance complained of: and if we were to make it absolute in its terms we should be inflicting upon the company a grievous hardship. If the plaintiff had stood before us without exception to his conduct, we might have moulded the rule so as to meet the justice of the case. But, looking at all the circumstances, and seeing that the grievance is a comparatively small one, *and that the complainant has not taken the course which it is reasonable to suppose would have led to his complaint being redressed, I think we are not called upon to step out of the way to assist him. I therefore think the rule must be discharged, but without costs, and with an intimation that the company are not justified in giving facilities to Messrs. Pickford which they do not afford to Mr. Cooper, and that, if a renewed application be rendered necessary, it may be attended with more success.

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The rest of the court concurring,

Rule discharged without costs.

JOHN BOYD and Another *v.* JOSEPH ROBINS and NATHAN LANGLANDS. *July* 5.

In July, 1850, A. and B. gave C. a guarantee (continuing) for goods to be supplied to D., with a stipulation that the security should subsist "until C. received a notice in writing to the contrary." Goods were supplied to D. upon the faith of this guarantee, and a balance exceeding 200*l.* was due in respect thereof. In June, 1854, B. became bankrupt, and duly obtained his certificate. No notice having been given to determine the guarantee:—Held, that B.'s liability thereon was a "contingent liability" within the 178th section of the 12 & 13 Vict. c. 106, and consequently that his certificate was a bar to a claim in respect of goods supplied to D. after the bankruptcy of B.(*a*)

THIS was an action brought upon a guarantee dated the 25th of July, 1850, to recover the sum of 200*l.* for goods sold and delivered and money lent to and money paid for one Thomas Kerr, by the plaintiffs.

The defendant Robins suffered judgment by default. The defendant Langlands pleaded; and, by consent of the plaintiffs and Langlands, and by order of Crowder, J., the following case (of which the pleadings *750] were *to form part) was stated for the opinion of the court:—

At the time when the guarantee was given, the plaintiffs were, and still are, warehousemen carrying on business at No. 5, Friday Street, London, and the defendant Robins was a miller and corn-chandler, and the defendant Langlands was a grocer and cheese-monger, at Dartford, in Kent. Thomas Kerr was a draper at Dartford.

On the 25th of July, 1850, the defendants, at the request of Kerr, gave the plaintiffs the following guarantee in writing:—

"To Messrs. John and Christopher Boyd, of No. 5, Friday Street, London, warehousemen, and the survivor of them.

"In consideration of your selling goods to Thomas Kerr, of Dartford, in the county of Kent, draper, we do hereby agree to guaranty to you and each of you the due payment of the amount of, or the balance unpaid to you for, any goods sold and delivered, and to be hereafter sold and delivered, and of any money lent and to be lent to or paid for the said Thomas Kerr by you, to the extent of 200*l.*: And we do further agree that you shall be at liberty at any time hereafter to call upon us for the payment of the said sum of 200*l.*, which may be applied by you as you think proper, either in payment or part payment of any debt which may be due to you from the said Thomas Kerr, or to make up any deficiency, or towards any loss on any debt which may be due or have been due to you, and not have been paid by him, after receiving any dividend or dividends or composition from his estate or him: And we do further agree that you shall be at liberty, without giving notice to us, or obtaining our consent, to extend the usual time or times of payment or credit for any goods sold or to be sold to the said Thomas Kerr, and to renew or take from him, as you may think proper, any bills, *751] notes, or securities for *the payment of any debt due from him to you, or any part thereof, and also to receive or accept any composition from the said Thomas Kerr in full for any debt, and to execute any release to him of the debt due from him, or any part thereof, and also to execute any assignment made by him in trust for his creditors: And we do further agree that this guarantee shall be a continuing guarantee, and shall be binding upon us for the payment of the

(*a*) See the note at the end of the case.

said 200*l.*, at all events, and under all circumstances, until you receive a notice in writing to the contrary. In witness, &c.

(Signed) "JOSEPH ROBINS.
"NATHAN LANGLANDS."

On the faith of this guarantee, the plaintiffs from time to time after the said 25th of July, 1850, and before the bankruptcy of the defendant Langlands, sold and delivered goods and lent money to and paid money for the said Thomas Kerr, to an amount exceeding 200*l.*; and in respect thereof the defendant Langlands, at the time of his bankruptcy, was liable to the plaintiffs to the amount of 200*l.* by virtue of the said guarantee.

The sum so due to the plaintiffs from the said Thomas Kerr was paid by him to the plaintiffs after the defendant Langlands became and was adjudicated bankrupt on the 24th of June, 1854, on the petition of a creditor to whom the defendant Langlands was indebted in an amount sufficient to support proceedings in bankruptcy.

The defendant Langlands was before and at the time of the said petition and adjudication a trader subject to the bankrupt laws, and obtained his certificate of conformity as such bankrupt, which was duly allowed on the 7th of September, 1854.

There was an estate of the said Nathan Langlands as such bankrupt applicable to the payment of dividends on the proofs under the said adjudication.

**The plaintiffs have not received notice in writing on behalf of the defendants, or either of them, that the said guarantee was not to remain a continuing guarantee.* [*752

The plaintiffs after, and having notice of, the said bankruptcy and the obtaining and allowance of the said certificate, sold and delivered certain other goods, and lent to and paid other money for the said Thomas Kerr, to an amount exceeding 200*l.*: and there is now due in respect of the same from the said Thomas Kerr a sum exceeding the said sum of 200*l.*, which said sum the said Thomas Kerr, though requested to pay, has not paid. The defendants have been requested to pay, but have not paid the said money.

The question for the opinion of the court was, whether, under the circumstances of the case, the defendant Nathan Langlands had a good defence to the action. If the court should be of opinion that the plaintiffs were entitled to recover against him in this action, then judgment was to be entered for the plaintiffs for the amount of 200*l.* But, if the court should be of opinion that the plaintiffs were not so entitled, then judgment was to be entered for the defendant Nathan Langlands, with costs of his defence, including the costs of and occasioned by this case; or (if the court should think fit so to order) the name of the said Nathan Langlands as a defendant might be struck out of the proceedings in this action, without objection on his part, on payment by the plaintiffs of costs as aforesaid.

C. W. Wood, for the plaintiffs.—This was a continuing guarantee until a notice given to determine it, and therefore it is altogether unaffected by the bankruptcy and certificate of Langlands. [WILLIAMS, J. —This point arose before the Lords Justices in a case of Ex parte Barwis, In re Strahan, 6 De Gex, McN., & G. 672. *There, a joint and several covenant was entered into by a principal debtor and [*753

his surety that the principal would pay a sum of money by three instalments, on three specified days. The first instalment was duly paid, but before the second became due the surety became bankrupt. The creditor applied to the commissioner to be admitted to claim against the bankrupt's estate in respect of the amount of the two unpaid instalments and interest, and was allowed: And the Lord Justices, on appeal, affirmed his decision, holding that the claim was properly admitted as upon a contingent liability under the 178th section of the 12 & 13 Vict. c. 106.] The plaintiffs' claim here is in respect of goods for which there could be no proof. Warburg *v.* Tucker, 5 Ellis & B. 384 (E. C. L. R. vol. 85), is an authority in point. There, the defendant, being indebted to the plaintiff, assigned to him, as security, an insurance on the defendant's life, and an insurance on the life of the defendant's wife, and covenanted, —first, to pay the premiums,—secondly, that, if he did not pay them, the plaintiff might pay them, and he, the defendant, would repay the plaintiff. The plaintiff sued the defendant upon this covenant, assigning for breaches,—first, that the defendant had not paid the premiums,—secondly, that the defendant had not repaid to the plaintiff premiums paid by the plaintiff on the defendant's default. The defendant, to the whole declaration, pleaded his bankruptcy and certificate, averring that they had occurred after the execution of the deed, but not that they had occurred after the breaches had taken place. On demurrer to the plea, it was held that it gave no answer to the declaration, neither of the plaintiff's claims being a debt payable upon a contingency within s. 177, nor a liability to pay money upon a contingency within s. 178. The observations of Lord Campbell in that case apply most strongly here. [WILLIAMS, J.—*That was said to be, not a contingent liability to pay money, but a contingent liability to pay damages. The Court of Queen's Bench and this court (in Young *v.* Winter, 16 C. B. 401 (E. C. L. R. vol. 81)) are at conflict upon the other point: therefore that case can hardly be considered as an authority here; especially as the Lords Justices in Ex parte Barwis give the preference to Young *v.* Winter.](a) It is impossible that words could be larger than those of this guarantee. The only sections of the bankrupt act which can apply to the present case, are, the 177th and the 178th. Section 177 enacts, that, "if any bankrupt shall, before the issuing of the fiat or the filing of a petition for adjudication of bankruptcy, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such fiat or the filing of such petition, the person with whom such debt has been contracted may, if he think fit, apply to the court to set a value upon such debt; and the court is hereby required to ascertain the amount thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may after such contingency shall have happened prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends, provided such person had not when such debt was contracted notice of any act of bankruptcy by such bankrupt committed." And s. 178 enacts, that, "if any trader who shall become bankrupt after the commencement of this act shall have

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(a) See Warburg *v.* Tucker, in error, 28 Law J., Q. B. 56.

contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the *demand in respect thereof shall not [*755
have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the court shall think fit; and, after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends: provided such person had not at the time such liability was contracted notice of any act of bankruptcy by such bankrupt committed: provided also, that, where any such claim shall not have either in whole or in part been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees, at any time after the expiration of such time, and if the court shall think fit, be expunged either wholly or in part from the proceedings." In the case of In re Willis, 4 Exch. 530,† a claim on a guarantee for a sum certain, was held, when due, to be provable as a debt, and, before it was due, to be provable as a debt due on a contingency, under the 56th section of the 6 G. 4, c. 16. [WILLIAMS, J.—That case has very little to do with the question. There was a debt: the only contingency was, whether or not the principal debtor would pay: when he failed to pay, it became an ascertained debt against the surety.] If the court feel bound by the decision in Young *v.* Winter, it would be idle to argue the case further here. But this distinction may be suggested. The sureties here had power to revoke the guarantee: not having done so, this may be considered as a new instrument *given after the bankruptcy. [WILLIAMS, J.—Why is a bankrupt who has given an absolute guarantee to be better off in this respect than one who has given a guarantee which he might at any time revoke?] By abstaining from giving notice to withdraw from the obligation, the bankrupt has deluded the plaintiffs into giving further credit to the principal. [BYLES, J.—You say that the bankrupt act only contemplates liabilities from which the bankrupt could not by his own act have relieved himself?] Precisely so. [*756

Aspland, contrà.—This instrument, assuming it to have been a continuing guarantee when given, ceased to be so on the bankruptcy of Langlands. [WILLIAMS, J.—How can the bankruptcy make any difference? It was not provable as an absolute debt. The bankrupt only became liable in the event of the principal debtor failing to pay.] The bankruptcy of Langlands put an end to his liability, just as much as if there had been a judgment against him: and no notice was necessary. The defendant's liability was exhausted quite irrespective of the bankrupt act. But the claim is clearly barred by the 178th section. The case of Young *v.* Winter, 16 C. B. 401 (E. C. L. R. vol. 81), fortified as it is by the opinion of Lord Justice Turner in Ex parte Barwis, is conclusive of the question. [WILLIAMS, J.—The difficulty that has occurred to some of us is this:—Assuming, that, in an ordinary case of guarantee, the liability of the surety would, according to Young *v.*

Winter, be the subject of a claim under s. 178, the commissioner would have to set a value upon it. But, with this clause enabling the surety to put an end to his liability by a notice, how is the value to be ascertained?] The difficulty of putting a value upon the claim affords no answer. [WILLIAMS, J.—The notice being given, the thing is of no *757] value at all.] The commissioner might then assess *it at a nominal sum. The intention of the legislature was that the bankrupt should be completely discharged. And there is no practical difficulty in these cases: it is not the contingency at the time of the adjudication that is to be valued; but when the parties come before the commissioner. If any difficulty arose then, notice might be given, and the proceeding adjourned, and then the claim would be limited to the goods already supplied, and so the matter would be reduced to a certainty. [WILLES, J.—Can you say that a man is liable to pay money upon a contingency, when by his own mere motion he may discharge himself from it? WILLIAMS, J.—The difficulties of ascertaining the value of the contingency are all met by Young *v.* Winter: the only doubt is whether that can be said to be a contingent liability which the party may himself put an end to by giving notice.] It would be a considerable stretch of imagination to suppose that the bankrupt intended to continue his liability. Hankin *v.* Bennett, 8 Exch. 107,† shows that a liberal interpretation is to be put upon the language of the section, in order to effectuate the general intention of the legislature.

Wood, in reply.—That this is a continuing guarantee, is clear. It was so held in Boyd *v.* Moyle, 2 C. B. 644 (E. C. L. R. vol. 52), which has ever since been acted upon. [WILLIAMS, J.—There is no doubt about that.] This is not a liability upon a contingency at all. A liability to pay money upon a contingency means something which a man is bound to do on the happening of an event which is beyond his control.

WILLIAMS, J.—This question as to the effect of the power reserved to the sureties to put an end to the guarantee by giving notice, being quite *758] a novel one, we *will take time to consider. As to the rest, we entertain no doubt. Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

It was very properly admitted by the counsel for the plaintiffs in this case, that, if the guarantee in question had been absolute, we should have been bound by the authority of Young *v.* Winter, 16 C. B. 401 (E. C. L. R. vol. 81), in this court (though conflicting with the decision of Warburg *v.* Tucker, 5 Ellis & B. 384 (E. C. L. R. vol. 85), in the Queen's Bench), to hold that the plaintiffs' demand fell within the 178th section of the 12 & 13 Vict. c. 106, and that the certificate was a good bar.

But it was contended, on the part of the plaintiffs, that the guarantee, being revocable at any time, at the option of the defendant, by the giving of notice in writing to the plaintiffs, was not within the statute, for two reasons,—first, that the bankrupt could not properly be said to be "under a liability," seeing that he might, if he pleased, preclude all liability, by giving notice to determine it,—secondly, that the plaintiffs would not have been allowed by the court of bankruptcy to make any claim, inasmuch as it would be idle to allow anything in respect of a

claim which the bankrupt, or, perhaps his assignees, might nullify instanter, by giving the requisite notice.

It must, however, be observed, that it might well be, that, between the time of the filing of the petition, and the time when notice could be effectually given to the plaintiffs, a liability might accrue by reason of a delivery of goods to the principal debtor, which the bankrupt might be called on to satisfy, on the contingency of the principal debtor failing to pay the price of the goods. And from any such contingent liability, *according to Young *v.* Winter, it was the intention of the statute to free the bankrupt. This can only be done by rendering his certificate a bar to all claims under the guarantee. [*759

As to the difficulty that the right of the creditor to claim in respect of goods which might be supplied after the bankruptcy, and so to compete with the other creditors, might depend on the caprice of the bankrupt as to whether he would or would not revoke the guarantee, the answer is, that the court of bankruptcy may, on that ground, fix the amount of the claim at a nominal sum, unless it appears that there has been already a delivery of goods for which the bankrupt may be liable in the event of the principal debtor's failing to pay for them.

For these reasons, we are of opinion that the defendant Nathan Langlands has a good defence to the action.

Judgment accordingly.(*a*)

(*a*) Reversed in the Exchequer Chamber: vide post, Vol. V.; 5 Jur. N. S. 915, 28 L. J. C. P. 73.

By the 5th section of the Bankrupt Act of 1841, it was provided that all creditors whose debts were not due and payable till a future day, all annuitants, holders of bottomry and respondentia bonds, sureties, endorsers, bail, or *other persons having uncertain or contingent demands* against the bankrupt, should be permitted to come in and prove such debts or claims, under the act, and should have a right, when their debts and claims became absolute, to have the same allowed them; and by another section it was provided that all debts provable under the act should be barred by the certificate.

Plain as the terms of this act are at first sight, it has given rise to much contrariety of decision, occasioned, doubtless, by the equally plain injustice which a literal interpretation must work in certain cases. Thus, it was at first held in some of the states that the claim of a surety before he had paid the debt was not provable against the estate of the principal, and therefore not barred by his discharge: Wells *v.* Mace, 17 Vermont 403; M'Mullin *v.* The Bank, 2 Barr 343; but this has been overruled on the highest authority: Mace *v.* Wells, 7 Howard, U. S. 272; Fulwood *v.* Bushfield, 14 Penn. St. 90; Clarke *v.* Porter, 26 Id. 141; Crofts *v.* Mott, 5 Barb. 305; Kyle *v.* Bostick, 10 Alab. 589: and the act has even been held in Pennsylvania to apply in the case of a guarantor, whose liability in that state is of a peculiarly contingent character: Stone *v.* Miller, 16 Penn. St. 450. Yet the earlier view has been abandoned with reluctance: see Swain *v.* Barber, 3 Williams, Verm. 292; Loring *v.* Kendall, 1 Gray 305; Leighton *v.* Atkins, 35 Maine 118; in which last case it was held that a *judgment* against a surety after the discharge of the principal created a new claim or demand which could not have been proved under the act, and was therefore not barred; and Mace *v.* Wells was distinguished on the ground that there the surety had paid *volun-*

tarily. The distinction thus pointed out is not, however, very obvious. That the right of contribution against a co-surety or co-obligor is destroyed by the bankruptcy of the latter was asserted in Tobias *v.* Rogers, 3 Kernan 59; Clarke *v.* Porter, 26 Penn. St. 141; Frentress *v.* Markle, 2 Iowa 553; but denied in Dale *v.* Warren, 32 Maine 94; Goss *v.* Gibson, 8 Humph. 199; Swain *v.* Barber, 3 Williams, Verm. 292; Dunn *v.* Spark, 1 Carter, Ind. 397.

Where, however, the claim or demand is one which is not uncertain or contingent merely in respect to the right to enforce it, but whose very existence, as has been said, depends on a contingency, the discharge will not operate on it prospectively: French *v.* Morse, 2 Gray 111; Swain *v.* Barber, 3 Williams, Verm. 292; Ellis *v.* Hamm, 28 Maine 387; Dunn *v.* Sparks, 1 Carter 397. Thus the surety on a probate bond is not discharged as respects breaches occurring after his bankruptcy: Loring *v.* Kendall, 1 Gray 305. So in the case of a surety on a constable's bond: Ellis *v.* Hamm, 28 Maine 385. In like manner, it has been held that the liability of a vendor on his covenant of warranty for an eviction occurring after his bankruptcy, is not barred thereby: French *v.* Morse, 2 Gray 111; Reed *v.* Pierce, 36 Maine 455. So of the implied warranty on the sale of chattels: Bennett *v.* Bartlett, 6 Cushing 225. But in other cases it has been decided that a covenant for quiet enjoyment is discharged by bankruptcy, in the case of encumbrances created before the time of the sale, because a right of action then existed, at least for nominal damages: Jamison *v.* Blowers, 5 Barbour 689; Shelton *v.* Peese, 10 Missouri 589; Read *v.* Pierce, 36 Maine 455. But in French *v.* Morse, 2 Gray 111, this distinction was denied, at least where no proof in bankruptcy had been made for the nominal damages. In Bush *v.* Cooper, 26 Mississippi 599, this question arose. A mortgage was executed containing a covenant for quiet enjoyment. The mortgagor was afterwards discharged as a bankrupt; and the mortgaged premises being subsequently sold under a paramount title, they were bought in by him. On a bill to foreclose the mortgage, it was held that the mortgagor could not set up the title thus acquired, as he was estopped by his covenant in the mortgage-deed, which was not in any way affected by the bankruptcy. On an appeal to the Supreme Court of the United States, the decree was affirmed, on the ground that the effect of the bankrupt law was not to be extended beyond its immediate purpose, which was the discharge of pecuniary liabilities; and that the covenant still subsisted for purposes of estoppel, though it might be gone for purposes of direct remedy; in respect to which last point the court intimated no opinion: Bush *v.* Cooper, 18 Howard 82.

On the whole, it can scarcely be considered that any definite rule on this subject has been established in the United States; and perhaps none will be till it is authoritatively settled whether the intent of the bankrupt law was to produce a peremptory extinction of all liabilities, whatever their character, or only of such as were capable of pecuniary estimation at the time of bankruptcy, by some rational means, so as to obtain a share in the assets. As the decisions generally proceed upon one or the other of these views of the policy of the Act of 1841, it is not to be expected that they can be otherwise reconciled.

*JESSIE DOLLEN, Administratrix of SILAS DOLLEN, deceased, *v.* WILLIAM BATT. *June* 7. [*760

C. leased premises to the defendant, reserving rent to herself, *her executors, administrators, and assigns*, with covenants by the lessee to pay the rent and to yield up the premises at the expiration of the term to C. *her executors, administrators, and assigns*. C. afterwards by lease and release conveyed the reversion to D. and another in trust for the wife of the defendant,—the deed containing, amongst other things, a power to the trustees to receive and retain their trust expenses. The defendant underlet the premises, and received the rent, the trustees never interfering, but, on the contrary, assenting to his so receiving it on behalf of his wife, the cestui que trust. Certain expenses were incurred in relation to the trust. D., the surviving trustee, died, leaving the plaintiff, his widow and administratrix, who sued the defendant for four years' rent, three of which accrued in the lifetime of D., and one since his death. The defendant pleaded that he before action paid the rent to his wife, with the consent of the trustee and of the plaintiff respectively:—

Held, that the facts above stated afforded no evidence to sustain the plea, and that, whether the interest of C. in the premises were a freehold or a chattel interest, the plaintiff, as administratrix, was at all events entitled to recover the arrears of rent accruing in the lifetime of the trustee.

THIS was an action for rent under a covenant. The declaration stated that one Susanna Collins, being possessed of a certain messuage, dwelling-house, garden, and premises, with the plots and parcels of land thereunto belonging, for a [chattel] term more than sufficient to enable her to make the demise and lease thereinafter mentioned, by deed, dated the 26th of March, 1845, demised the same to the defendant, to hold the same to the defendant for a time not yet expired, to wit, for the term of twenty-one years from the 25th of December then last past, yielding and paying therefore yearly and every year unto the said Susanna Collins, her executors, administrators, and assigns, during the first seven years of the said term the rent or sum of 17*l.*, and during the last fourteen years the rent or sum of 12*l.*, by even and equal payments, on the following days in the year, that is to say, the 25th of March, the 24th of June, the 29th of September, and the 25th of December; that the defendant did by the same deed covenant with the said Susanna Collins and her assigns that he the defendant would well and truly pay to the said Susanna Collins and her assigns the aforesaid rent of 17*l.* during the first seven years of the said term, and the said yearly rent of 12*l.* during the last *fourteen years of the said term, according to the reservation thereof and the true intent and meaning [*761 of the said covenant; that afterwards, by deed dated the 14th of August, 1845, the said Susanna Collins, then being possessed of the reversion expectant on the determination of the said term, assigned and transferred such reversion of the said demised premises to the said Silas Dollen and Zebulon Page, to hold unto the said Silas Dollen and Zebulon Page for the residue of the said term and interest of the said Susanna Collins therein, whereby they became possessed of such reversion; that afterwards the said Zebulon Page died, leaving the said Silas Dollen him surviving, who afterwards and before suit died, and after whose death such administration as aforesaid was in due form of law granted to the plaintiff, who thereupon, as such administratrix as aforesaid, became and was and is possessed of the reversion aforesaid, and entitled to the said rent; that, after the death of the said Zebulon Page, during the lifetime of the said Silas Dollen, a large sum of money of the said rent of 12*l.*, to wit, the sum of 48*l.*, for divers, to wit, three years of the said term,

became and was due and owing from the defendant to the said Silas Dollen, and was still in arrear and unpaid; and that afterwards, and after the plaintiff became possessed as aforesaid, and before suit, a further large sum of the aforesaid rent of 12*l.*, to wit, the sum of 12*l.*, for one year's rent, became and was due and payable from the defendant to the plaintiff as administratrix as aforesaid, and still was in arrear and unpaid, contrary to the said covenant: and the plaintiff, as such administratrix as aforesaid, claimed 50*l.*

The defendant pleaded,—first, that the said Susannah Collins was not possessed of the said demised premises for a term, as in the declaration alleged,—secondly, that the said Susanna Collins did not assign
*762] *and transfer the said reversion to the said Silas Dollen and Zebulon Page, as in the declaration alleged,—thirdly, for defence on equitable grounds, that, in and by the said deed in the declaration mentioned in that behalf, the said Susanna Collins assigned and transferred the said reversion unto and to the use of the said Silas Dollen and Zebulon Page, in trust, after the decease of the said Susanna Collins, for Christian Batt, the wife of the defendant, for the term of her natural life; that the rent for which this action is brought accrued after the decease of the said Susanna Collins; and that he, the defendant, before action, paid the said rent to the said Christian Batt, with the consent of the said Silas Dollen and the plaintiff respectively.

The plaintiff joined issue on each of these pleas.

The cause was tried before Willes, J., at the last Spring Assizes for the county of Somerset, when the facts which appeared in evidence were as follows:—On the 6th of March, 1845, Susanna Collins,—the nature of whose interest in the premises did not very distinctly appear,—granted to William Batt (the defendant) a lease of certain premises at Ashill, in the county of Somerset, for twenty-one years from the 25th of December then last; reddendum to the lessor "her executors, administrators, and assigns," during the first seven years of the term the yearly rent of 17*l.*, and during the last fourteen years the yearly rent of 12*l.*, payable quarterly. The lease contained a covenant by the lessee, for himself, his heirs, executors, administrators, and assigns, with the lessor, "her executors, administrators, and assigns," to pay the rent to her, "her executors, administrators, and assigns," to pay taxes, to repair, &c., and also a covenant that the lessee, his executors, administrators, and assigns, should and would at the expiration of the term
*763] peaceably give and yield *up possession of the said hereditaments to the lessor, "her executors, administrators, and assigns, or to whom she or they should direct and appoint."

On the 14th of August in the same year, Susanna Collins, by lease and release and grant, conveyed the premises, "together with all rights, &c., thereto belonging or appertaining; and all reversions and remainders, rents and profits thereof; and all the estate, right, title, interest, use, trust, term and terms of years, property, possibility, claim, and demand whatsoever, both at law and in equity, of her, the said Susanna Collins, of, in, or to the same; and also all deeds, evidences, and writings whatsoever relating to the said hereditaments and premises, now in the possession or power of the said Susanna Collins,"—to the use of Silas Dollen (the husband of the plaintiff) and Zebulon Page, their heirs and assigns for ever, upon trust to pay and apply the rents,

issues, and profits of the said hereditaments and premises unto, or to permit and suffer the same to be received by, the said Susanna Collins and her assigns for and during the term of her natural life; and, from and after her decease, in trust for Christian Batt (the wife of the defendant) and her assigns for and during the term of her natural life, provided she so long continued a widow, in case of the death of the said William Batt, her said husband; and, from and after her decease, in trust for the said William Batt and his assigns for and during the term of his natural life; and, from and after the several deceases of the said Christian Batt and William Batt, or in case the said Christian Batt should survive her said husband and marry again, then in trust for John Collins Batt (son of the said William Batt and Christian his wife), his heirs and assigns for ever, subject nevertheless to and charged with the payment of a sum of 5*l.* apiece to each of his brothers and sisters who should be then *living; and, in case the said John Collins Batt should depart this life in the lifetime of his said father or mother, [*764 then in trust, as to the before-mentioned hereditaments and premises, for all and every the child and children of them the said William Batt and Christian his wife, equally between and amongst them, share and share alike, as tenants in common, and not as joint-tenants; and, in default of all such issue, then in trust for the said William Batt, his heirs and assigns for ever. The deed also contained a clause empowering each of the trustees "to receive and retain his trust expenses."

Zebulon Page, one of the trustees, died in 1851; and, in December of that year Susanna Collins also died, having in her lifetime, but after the execution of the deed of gift above set out, executed an assignment (for, as was said, a valuable consideration) of the premises in question to one Winter. Winter claiming to be entitled to the premises under this assignment, Silas Dollen, the surviving trustee under the deed of August, 1845, and the defendant, consulted Messrs. Trenchard, solicitors, of Taunton, and they, by arrangement with the solicitor acting for Winter, caused a case to be stated for the opinion of counsel. The opinion proved in favour of the claim of Winter: but the defendant declined to be bound by it, and defended an action brought by Winter, and succeeded in establishing the deed of August, 1845, Winter failing to prove that the assignment under which he claimed was made for a valuable consideration.

Messrs. Trenchard's bill of costs against Silas Dollen, as trustee, upon this occasion, amounted to 19*l.* 13*s.* 11*d.* Dollen sent Messrs. Trenchard's bill to Batt, who declined to pay it, alleging that the charges were exorbitant. Dollen, being pressed for payment, handed over to Messrs. Trenchard the title-deeds of the trust property, telling them that they should hold them as *security; and he gave notice to [*765 Batt's under-tenant to pay rent to him (Dollen), and was proceeding to enforce his demand when he died.

After the death of Silas Dollen, Messrs. Trenchard demanded the amount of their bill from Mrs. Dollen, his widow and administratrix; and, as the only means of putting herself in funds to meet that demand, the present action was brought to recover four years' rent under the lease,—three accruing in the lifetime of Silas Dollen, the surviving trustee under the deed of August, 1845, and one since his death.

It appeared that Silas Dollen had never interfered with the property

or received any rent, but that the rent had been always received by Batt from the under-tenant, Dollen saying that he might as well keep it; and there was evidence, that, after the death of Dollen, the plaintiff had said that she meant to do precisely as her husband had done.

On the part of the defendant it was contended that the plaintiff was not entitled to recover, inasmuch as there was no evidence to show that the reversion in Susanna Collins was a chattel reversion, so as to pass to the plaintiff as administratrix of the surviving trustee; and also that the third plea was proved.

A verdict was found for the plaintiff, which by consent of her counsel was taken for the amount of Messrs. Trenchard's bill, subject to taxation; and leave was reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the plaintiff failed to prove the title put in issue by the first and second pleas; or to enter a verdict for the defendant on the third issue, on the ground that the evidence sustained the third plea; or to reduce the damages to 12*l.*, the amount of one year's rent under the lease, on the ground that the third plea was
*766] proved as far as regarded the rent accruing in the *lifetime of the trustee Silas Dollen,—with power to the court to make any amendments in the declaration which they might think necessary and proper; and leave to the defendant to add a general plea of payment.

Kingdon, in Easter Term last, obtained a rule calling upon the plaintiff to show cause why the verdict on the third plea should not be set aside, and instead thereof a verdict be entered for the defendant, pursuant to the leave reserved, on the ground that there was evidence for the jury in support of the whole of that plea; or why the damages should not be reduced to 12*l.*, on the ground that the whole of the third plea was proved, except as to the last year's rent; or why a nonsuit should not be entered, pursuant to the like leave, on the ground that the plaintiff failed to prove the title put in issue by the first and second pleas,—the plaintiff to be at liberty to contend, if necessary, upon the argument of the rule, that judgment should be entered for him on such third plea non obstante veredicto.

Prideaux now showed cause.—This action is brought to recover four years' rent under a lease granted by Mrs. Susanna Collins, to the defendant,—three of which accrued in the lifetime of Silas Dollen, the fourth since his death. It was objected on the part of the defendant, that the declaration is framed as upon a chattel reversion, whereas there was no evidence that it was a chattel interest. That, however, is an illegitimate inference from the decisions that the words "during the term" in the reddendum are of such force and efficacy that the words "executors and administrators" may be rejected as surplusage, and the
*767] rent will go to the person entitled to the reversion. The lease *contains a covenant to pay the rent, and at the expiration of the term to yield up the premises, to the lessor, "her executors, administrators, and assigns." It is true, the assignment from Mrs. Collins to the trustees purports to deal with the property as if it were a freehold of inheritance. It is, however, a mere grant, which will convey a chattel interest as well as a freehold. However reserved, the rent follows the reversion. The leading case upon this subject is Sacheverell *v.* Froggatt, 2 Wms. Saund. 367 a, 2 Lev. 13, Sir T. Raym. 213, 1 Vent. 148, 161, 2 Keble 798, 819, 833, 839. There, one seised in fee let for years,

reserving rent *during the term*, to the lessor, *his executors, administrators, and assigns*, and the lessee covenanted to pay it accordingly, and the lessor devised the reversion, and died: it was held that the reversion was good to continue the rent during the whole term, and that the devisee should have an action of covenant for the non-payment of it. In the note (7) in 2 Wms. Saund. 371, it is said: "In the report of this case in 1 Vent. 161, Lord Hale delivers the opinion of the court pretty much at length, and lays down some useful rules respecting the reservation of the rent. He said, that, where the reservation of the rent is general, the law directs according to the intent [interest?] and the nature of the thing demised. As, if tenant in tail makes a lease for years, rendering rent to him *and his heirs*, the rent shall go to the *heir in tail* along with the reservation; for, the law uses all industry imaginable to conform the reservation to the estate. So, where tenant for life, the remainder over to several by limitation of uses, with power to make leases, demises, rendering rent to him, *his heirs and assigns*, it shall be adjudged to him in remainder: Whitlock's Case, 8 Co. Rep. 70 b. So, if lessee for one hundred years make a lease for fifty years, rendering rent to him *and his heirs* during the term, it shall go to the *executor*. So, where a *copyholder by license leases, rendering rent to him and his wife [*768 during their lives, and to his heirs, where by the custom the wife has her free-bench, the wife shall have the rent as incident to the reversion, though not party to the lease; for, the reversion, if possible, will attract the rent to it. So, if tenant in tail to him and the heirs male of the body of his father, lets the land, rendering rent to him, *his heirs and assigns*, the rent shall go to the heir male of the body of his father, though he be not heir to the lessor; for, it is incident to the reversion: Cother *v.* Merrick, Hardr. 91, 95. But a man may reserve a rent to himself for his life, and a different rent to his heir: Co. Litt. 213 b, 214 a." [BYLES, J.—You are quite safe if you make the reservation to the lessor, his *heirs*, executors, administrators, and assigns.] Yes; and it is at least doubtful, if you do not. In Wooton *v.* Edwin, 12 Co. Rep. 36, one Hawes, seised in fee of a messuage, &c., demised for a term, reserving rent to himself and his assigns, and it was adjudged that by this reservation the heir should not have the rent, for that the reservation was made to the father, his executors and assigns, and not to his heirs, &c.:" and the court said that, in a case of replevin, inter Richmond and Butcher, the case was that Butcher avowed for rent, as heir to his father, upon a demise made by his father of certain lands for twenty-one years, by these words "reddendo et solvendo proinde durante prædicto termino 21 annorum præfato (fratri), executoribus et assignatis suis, 10*l.* legalis monetæ Angliæ, &c., at festam, &c.;" and it was adjudged, that, by this reservation, the heir should not have the rent, for that the reservation was made to the father, his executors and assigns, and not to his heirs, &c. That case is perhaps not law at the present day; but it is an authority to show that the inclination of the courts then was, that, if you reserve the rent expressly, you must *do [*769 it correctly. [WILLIAMS, J.—The only question here is, whether, looking at the lease, we must not presume that the rent is reserved according to the real quality of the estate.] The reversion is by the language of the lease admitted to be a chattel reversion; and, if so, the plaintiff, as administratrix, is entitled to recover the whole four years'

rent: but, as to the three years which accrued in the lifetime of Silas Dollen, that, at all events, would be personalty. Then, as to the other branches of the rule,—there was no evidence of any payment made, nor of any assent on the part of the trustee or of the plaintiff to the defendant receiving and retaining the rent, so as to negative the right of the trustee or his personal representative to look to the rent for repayment of the necessary disbursements on account of the trust.

Kingdon, in support of the rule.—There is no evidence that this was a chattel interest; and, at all events, if the lease afforded any such, it is rebutted by the deed of the 14th of August, 1845, which treats the interest as freehold. No doubt the use of the word "heirs" or "executors" is not conclusive: the rent follows the reversion. The rule is well laid down in 1 Williams's Executors, 5th edit. 730: "When a man *seised in fee* makes a gift in tail, or lease for life or for years, reserving rent, the whole rent which becomes due after his death shall go with the reversion (as an incident thereof) to his heir, and not to the executor; for, since during the continuance of the particular estate the reversioner loses the profits of the land, the rent ought to be paid to him as a compensation for the loss: Co. Litt. 47 a; Cother *v.* Merrick, Hardr. 95; 3 Bac. Abr. 62, *Executors* (H. 3): and, though the rent should be expressly reserved to the lessor, his *executors* and assigns, without naming the heir, the executors cannot have it, being strangers *to the reversion, which is an inheritance: Co. Litt. 47 a. Whether the heir shall have it, though not mentioned, or it shall altogether determine by the lessor's death, the cases are discordant: see notes (2) and (3) to Sacheverell *v.* Froggatt, 2 Saund. 367 *b*, where all the authorities are collected. But, if the rent be reserved *during the term* to the lessor, his executors, administrators, and assigns, the heir or devisee shall have it: Ibid. On the other hand, if a *lessee for years* makes an underlease, reserving rent, the rent accruing after his death shall go to his executor or administrator, and not to his heir, even though the reservation were to him and his heirs, during the term, without mentioning the executors: 2 Wms. Saund. 371, n. (7) to Sacheverell *v.* Froggatt. In these cases, if the personal representative sues the underlessee for rent due since the death of the testator or intestate, it must be alleged that he had a chattel interest; otherwise it shall be intended that he was seised in fee, and then the rents belong to the heir, and not to the executor or administrator: Norris *v.* Elsworth, 1 Freem. 463." The nature of the interest is not controlled by the use of the word "executors." Primâ facie, where a man grants a lease, the presumption is that he is seised in fee; though the lessee would not be estopped, even where words denoting a freehold interest are used, from showing that it was a chattel interest only. Thus, in Doe d. Strode *v.* Seaton, 2 C. M. & R. 728,† a lessee for years covenanted to pay the rent to the lessor, *his heirs and assigns*, and also to deliver up possession of the demised premises at the expiration of the term to the lessor, *his heirs and assigns*: in an action of ejectment brought by the devisee of the lessor against the assignee of the lessee, after the expiration of the term, to recover possession of the premises, it was held that the assignee was not estopped by such covenant from showing that the lessor was only tenant for life of the premises demised. It being urged in argument there that the defendants could not be allowed to set up the

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defence of estoppel contrary to the words of the covenant in the lease, to give up the possession of the premises to the lessor, his heirs and assigns, and that they could not be allowed to set up an interest contrary to an express covenant,—Parke, B., asks, "Is there any case which establishes that the words of such a covenant make any difference? Who could have sued for a breach of this covenant for not giving up possession at the end of the term? It was not a covenant running with the land, and therefore the heir could not sue. This lease does not operate as an estoppel, because Col. Strode, having a life estate, had a right to grant a lease for twenty-one years, determinable upon his life, and therefore an interest passed; and, where an interest passes, there is no estoppel." In Berry *v.* White, Sir O. Bridgman 82, 103, it is said: "Another reason which may be given why this reservation to Sir Robert, his heirs and assigns, may be good, is, the words *heirs and assigns* do not denote any person certain, as, if he had reserved it to his wife or daughter, or the like, but properly intend only the duration of the estate in the rent, that is, so long as the estate lasts, and so reddendo to him, his heirs and assigns. Durante termino prædicto, is no more than reddendo durante termino prædicto,"—a doctrine adopted in the judgment of this court in Greenaway *v.* Hart, 14 C. B. 340, 352 (E. C. L. R. vol. 78). It is submitted, therefore, that the evidence did not sustain the issues on the first and second pleas. As to the third plea, there was abundant evidence to support it. It was proved that Silas Dollen never interfered in his lifetime, nor did the plaintiff after his death. The defendant was allowed to receive the rent from the under-tenant as a sort of agent of his wife. If there be any difficulty as to the form of the plea, that may be obviated by the *addition of a common plea of payment, pursuant to the leave reserved to the defendant at the trial. [*772

COCKBURN, C. J.—I am of opinion that this rule should be discharged. The plaintiff, as administratrix of her deceased husband, sues the defendant for four years' rent alleged to be due under a lease made by Mrs. Collins, who some time after the making of the lease conveyed the property to Silas Dollen and Zebulon Page, as trustees, for the benefit of Christian Batt, the wife of the lessee. During the first three years in respect of which the rent was claimed, the husband of the plaintiff was living: during the last year he was dead, and the plaintiff was acting as his administratrix. It is necessary to distinguish between these two periods. As regards the first three years, the defendant says that Dollen, the deceased trustee, allowed him, instead of paying the rent to him, to apply it to the purposes of the trust, and to deal with it as he thought proper, he being substantially the cestui que trust. That is a question upon the evidence; and I am of opinion that the evidence does not go the length of what is contended for by the defendant. It is true that Dollen, to save himself trouble, instead of calling upon the lessee to pay him the rent, permitted him to retain it. But I am clearly of opinion that there is nothing in the evidence which amounts to payment, even if there had been a plea of payment upon the record; nor anything amounting to a dispensation on the part of the trustee, or abandonment of his right to call for the rent to indemnify him against any expenses he might incur in carrying out the trusts. That being so, it follows that the plaintiff is entitled to recover in respect of the three

years, irrespectively of the question whether this was a freehold or a chattel interest; the rent for that period being a fruit fallen in the life-
*773] time of the intestate, *which would pass to his administratrix. It is only upon the supposition that that is an erroneous view that the other question becomes material, because, if Dollen had dispensed with the payment of this rent by the defendant, the question would then have arisen whether Mrs. Dollen, as his administratrix, was entitled to receive the rent for the last year; and that would depend upon whether the property was freehold or leasehold. We have before us two documents which are not consistent. The lease from Mrs. Collins to Batt shows a chattel interest: it demises the premises for a certain term, reserves rent, &c., and provides for the rendering up of the premises at the expiration of the term, not to the heirs of the lessor, but to her "executors, administrators, and assigns." It clearly, therefore, purports to be only a chattel interest. But it is true that, in the instrument by which Mrs. Collins conveys to the trustees for Mrs. Batt, she professes to deal with the estate as a freehold estate; and she has recourse to a deed appropriate to the passing of a freehold interest. The question is, what inference are we to draw from the effect which is to be given to both those instruments? Where there are two presumptions, the stronger one must prevail. In the one case, Mrs. Collins appears to be dealing with the property as a chattel interest; in the other as a freehold: and certainly the presumption is stronger in favour of that construction which cuts down the party's interest, than of that which enlarges it. Therefore, if we are wrong upon the first point, still I think we are clearly justified in concluding that this was a chattel interest only, and that consequently the plaintiff is entitled to recover the last year's rent. It might in one event be necessary to amend the declaration: and, if it be proposed to carry the case further, we will amend accordingly. I entertain a clear opinion that the evidence does
*774] not justify us in concluding that *Dollen had done anything to divest himself of the right to enforce payment of the rent by Batt. And Mrs. Dollen, his administratrix, has done nothing to disentitle her to recover the first three years' rent certainly, and probably the fourth. Upon the whole, therefore, I am of opinion that the plaintiff is entitled to retain the verdict.

WILLIAMS, J.—I am of the same opinion. The case is a somewhat singular one. It is in effect an action by a landlord against a tenant, the landlord being trustee for the tenant in respect of the rent for the recovery of which the action is brought. Some confusion has been unnecessarily introduced into the case by forgetting the precise position of the parties, and treating it as one where the cestui que trust has been permitted to receive the rents and profits of the trust-estate. That is altogether a mistake: Dollen had no right to the rent reserved by the underlease; he was only entitled to the rent reserved by the lease granted to Batt by Mrs. Collins, as trustee for the wife of the defendant, the lessee. Then it is said that there was some equity on the part of the wife, to prevent the trustee from paying the money to the husband, which otherwise it would have been his duty to do. A lease was put in, and an assignment: and the question arises, whether the interest which the reversioner had was freehold or chattel. On that I must confess I feel very considerable difficulty. The presumption of law is, where the

lease is silent, that the interest is freehold. The terms of this lease are inconsistent with a reversion in fee: the rent is reserved to the lessor, her executors, administrators, and assigns, and not to the heir: there are also covenants therein which would not exist in the case of a freehold reversion. I quite agree with the argument urged by Mr. *Kingdon*, that these *expressions in the lease are not binding so as to alter the rights of the parties. But that is not the question here: the [*775 question is, whether they afford any evidence of the nature and quality of the reversion. If there had been nothing else in the case, I should have thought that the ordinary principle of law was rebutted, and that the reversion was a chattel interest. But, when the lessor comes to assign her reversionary interest, she deals with it as one of inheritance; and thus we are driven back to the original presumption. I have great difficulty in saying that there is anything on the face of this case to induce me to infer that this was a chattel reversion. But it seems to me to be altogether unnecessary to decide that point, the plaintiff having consented to take a verdict, not for what she would in strictness be entitled to recover, but for such a sum as would suffice to protect her in respect of the disbursements of the trustees. There is clearly enough to sustain the verdict so reduced. Whatever the nature of the interest which passed by the assignment, the three years' rent clearly would go to the personal representative; and that is more than enough to absorb the sum for which the verdict is taken. The only question is whether there is any answer to that. The defendant insists that there is already an answer upon the record, and that at all events the plaintiff's case is answered by the plea which he has leave to add. The third plea now on the record clearly was not proved. It alleges that in and by the deed in the declaration mentioned, Susanna Collins assigned and transferred the reversion unto and to the use of Dollen and Page, in trust, after the decease of the said Susanna Collins, for Christian Batt, the wife of the defendant, for life; and avers that the rent for which this action is brought accrued after the decease of the said Susanna Collins, and that he, the defendant, *before action brought, paid the said [*776 rent to the said Christian Batt, with the consent of the said Dollen (the surviving trustee) and the plaintiff respectively. All that the evidence amounts to, taken in the most favourable point of view for the defendant, is this, that the trustee said to the cestui que trust,—or, in other words, the plaintiff to the defendant,—"You need not pay the rent to me, because I am your trustee." Good sense and justice require that it should amount, not to payment, but to dispensation of payment. I therefore think the action was properly brought, and is maintainable at all events for the amount for which the verdict is taken.

BYLES, J.—I also am of opinion that the verdict was right, and that there is no ground for any part of the rule. In the first place, I think there is evidence of a chattel reversion. Conceding that primâ facie every reversion is a freehold reversion, here is a covenant to yield up the premises at the expiration of the term to the executors of the lessor. If the lease had contained a recital that the executors were entitled to the reversion, that would clearly have been a recital of a chattel interest. Here, there is a covenant to yield up possession at the end of the term to the lessor, her executors, administrators, or assigns, which is the same thing; it is a statement by the lessor and lessee that the reversion

is a chattel reversion. I am not sure that there is not another piece of evidence, because Mrs. Dollen, speaking of the rent which would have become payable to her, said that she should treat it as her husband had treated it. Now, if she was speaking of rent which would come to her because she was administratrix, that would be some evidence of a chattel reversion. On the other hand, the conveyance treats it as a freehold
*777] interest, being a conveyance by lease and *release or grant. But that is quite as consistent with its being a chattel interest as a freehold, inasmuch as it would operate a conveyance of either: and it may be that Mrs. Collins, besides this chattel interest, may have had some superior freehold reversion, which this would be an apt deed to convey. Then it is said that the rent has been paid. Now, as to the plea of payment, I am not aware of any case in which a plea of payment has been supported where it has been sought to set off an equitable demand against a legal one. But, independently of that, the averment in the third plea is, that the defendant, before action, paid the rent to Christian Batt, with the consent of the said Silas Dollen and the plaintiff respectively. I see no evidence that Dollen ever assented to any such arrangement; but, on the contrary, it seems to me that there is strong evidence to negative that. The trustees had a lien upon the reversion, whatever it was, in the position of first mortgagees. Can it be presumed that they abandoned their lien for the debt due, because they declined to trouble themselves with the receipt of the rent? I entirely agree in the view presented by my Brother Williams, and I think that upon every point the verdict was perfectly right. If there be any difficulty, that may be got rid of by an amendment.

WILLES, J.—I entirely concur with the rest of the court in thinking that this rule must be discharged: and, in fact, the amendment suggested would at once make an end of the thing. There ought to be a certificate for costs, because the verdict, if it had passed in the proper form, would have been for a sum exceeding 20*l.*: and Mr. *Prideaux* ought not, I think, to be prejudiced by the concession made by him at the trial. The rule will therefore be discharged, with liberty to the
*778] plaintiff to amend the declaration by alleging a *reversion in Susanna Collins in general terms, if the defendant carries the case further; and also with liberty to reamend to a chattel interest, if the court of error should think it necessary.

Rule discharged accordingly.

ROBINS v. POWER. *June* 5.

Where a change of ownership in a British vessel takes place, by sale in this country, whilst she is in a foreign port, the contract under which the crew shipped is (quoad the new owner) at an end: but, if one of the crew continues to serve on board the vessel at the request of an agent of the new owner, without entering into any fresh articles, and afterwards, and before the termination of the contemplated voyage, quits with the consent of the captain appointed by the new owner, he may in an action against such new owner recover wages pro rata.

THIS was an action for wages alleged to be due from the defendant to the plaintiff as a hired seaman and mariner of a vessel of the defendant called the Constance Emma, under and by virtue of a certain hiring

by the defendant of the plaintiff as such seaman and mariner, and for work and services done and rendered by the plaintiff for the defendant at his request.

The defendant pleaded,—first, never indebted,—secondly, a special plea stating in substance that the plaintiff had engaged to serve as a seaman on board the Constance Emma for a certain voyage within the meaning of the Merchant Shipping Act, 1854, and that, during the voyage, the defendant deserted the said vessel within the meaning of the said statute. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after Hilary Term last. The facts which appeared in evidence were as follows:—On the 23d of August, 1855, the plaintiff signed articles and shipped as a seaman on board the Constance Emma, for a voyage from Aden to Suez, and thence to Bombay or Moulmein, at 3*l.* 10*s.* per month wages. The vessel sailed, and early in November in the same year she arrived at Suez. Whilst she was lying in the Suez Roads, viz., on the 18th of December, 1855, the then *owner sold her (in Liverpool) to the defendant. The defendant immediately upon [*779 becoming the purchaser of the vessel sent one Parr out to Suez to act as his agent. Parr arrived at Suez on the 10th of January, 1856, and shortly afterwards Abernethy, who was master of the vessel when she sailed from this country, gave up the command (which was assumed by the first mate), and left the vessel. The crew then for the first time learned that the vessel had been sold. The plaintiff remained on board the vessel until the 10th of March, when one Townsend, who had been sent out by the defendant to succeed Abernethy in the command, arrived at Suez. Townsend, finding the crew in a very dissatisfied state, and refusing to work unless paid the wages they had earned, took them before the vice-consul at Suez, contending that they were bound to perform their contract, and that they were entitled to nothing until the arrival of the ship at Bombay. Upon appeal to the consul-general at Alexandria, that functionary decided, upon an erroneous construction of the 205th section of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, that the crew were entitled to receive their wages and discharge if they did not choose to continue on board. Ultimately, however, all the crew, with the exception of the plaintiff, were induced to remain. Townsend, the new master, ineffectually tried to induce the plaintiff to remain and to sign fresh articles; and the plaintiff finally quitted the ship on the 19th of April, 1856, which sailed from Bombay without him a few days afterwards. The plaintiff had continued to do duty on board until the day he so quitted the ship.

By his particulars of demand, the plaintiff claimed wages for the whole period during which he was on board, viz. from the 23d of August, 1855, to the 19th of April, 1856; but, at the trial, he confined his claim to *the time when the defendant became owner of the [*780 vessel.

On the part of the defendant, it was insisted, that the plaintiff was not entitled to recover, inasmuch as he served under a special contract (with the original owner of the vessel) which he had failed to perform; and that he had forfeited all right to wages by having deserted.

The jury, however, found that the plaintiff left the ship with the consent of Townsend, the new master; and, under the direction of the

learned judge, they returned a verdict for the plaintiff for 14*l.* in respect of four months' service from the 18th of December, 1855, when the change of ownership took place,—leave being reserved to the defendant to move to enter a nonsuit or a verdict for him, if the court should be of opinion that there was no evidence to sustain the verdict for the plaintiff.

Edward James, Q. C., accordingly, in Easter Term last, obtained a rule nisi to enter a nonsuit or a verdict for the defendant, on the ground "that there was no evidence to justify a verdict for the plaintiff;" or for a new trial, on the ground that, "if there was any such evidence, the same should have been left to the jury;" or why the damages should not be reduced as the court should direct.

Brett now showed cause.—There was abundant evidence to warrant the verdict. The provisions as to the discharge of seamen and payment of wages are contained in the 170th, 171st, and 172d sections of the 17 & 18 Vict. c. 104. The 170th section enacts, that, "in the case of all British foreign-going ships, in whatever part of Her Majesty's dominions the same are registered, all seamen discharged in the united *781] *kingdom shall be discharged and receive their wages in the presence of a shipping-master duly appointed under this act, except in cases where some competent court otherwise directs; and any master or owner of any such ship who discharges any seaman belonging thereto, or, except as aforesaid, pays his wages within the united kingdom in any other manner, shall incur a penalty not exceeding 10*l.*; and, in the case of home-trade ships, seamen may, if the owner or master so desires, be discharged and receive their wages in like manner." The 171st section enacts, that "every master shall, not less than twenty-four hours before paying off or discharging any seaman, deliver to him, or, if he is to be discharged before a shipping-master, to such shipping-master, a full and true account, in a form sanctioned by the board of trade, of his wages and of all deductions to be made therefrom on any account whatever, and in default shall for each offence incur a penalty not exceeding 5*l.*; and no deduction from the wages of any seaman (except in respect of any matter happening after such delivery) shall be allowed unless it is included in the account so delivered; and the master shall, during the voyage, enter the various matters in respect of which such deductions are made, with the amounts of the respective deductions, as they occur, in a book to be kept for that purpose, and shall, if required, produce such book at the time of the payment of wages, and also upon the hearing before any competent authority of any complaint or question relating to such payments." And the 172d section enacts, that, "upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of his discharge, in a form sanctioned by the board of trade, specifying the period of his service and the time and place of his discharge; and, if any master fails to sign and give to any such seaman such certificate of discharge, he shall for *782] *each such offence incur a penalty not exceeding 10*l.*; and the master shall also, upon the discharge of every certified mate whose certificate of competency or service has been delivered to and retained by him, return such certificate, and shall in default incur a penalty not exceeding 20*l.*" [COCKBURN, C. J.—Do not these sections presuppose that the same owners continue in possession of the ship?]

There certainly is nothing in them which points to a change of ownership. The case of a sale of a ship abroad is provided for by s. 205, which enacts, that, "whenever any British ship is transferred or disposed of at any place out of Her Majesty's dominions, and any seaman or apprentice belonging thereto does not in the presence of some British consular officer, or, if there is no such consular officer there, in the presence of one or more respectable British merchants residing at the place, and not interested in the said ship, signify his consent in writing to complete the voyage if continued, and whenever the service of any seaman or apprentice belonging to any British ship terminates at any place out of Her Majesty's dominions, the master shall give to each such seaman or apprentice a certificate of discharge in the form sanctioned by the board of trade as aforesaid, and, in the case of any certified mate whose certificate he has retained, shall return such certificate to him, and shall also, besides paying the wages to which such seaman or apprentice is entitled, either provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to such other port in the united kingdom as is agreed upon by him, or furnish the means of sending him back to such port, or provide him with a passage home, or deposit with such consular officer, or such merchant or merchants as aforesaid, such a sum of money as is by such officer or merchants deemed sufficient to defray the *expenses of his subsistence and passage home; and such consular officer or merchants shall endorse upon the agreement of [*783 the ship which the seaman or apprentice is leaving the particulars of such payment, provision, or deposit; and, if the master refuses or neglects to comply with the requirements of this section, such expenses as last aforesaid, if defrayed by such consular officer or by any other person, shall, unless such seaman or apprentice has been guilty of barratry, *be a charge upon the ship* to which such seaman or apprentice belonged *and upon the owner for the time being thereof*, and may be recovered against such owners, with costs, at the suit of the consular officer or other person defraying such expenses, or, in case the same has been allowed to the consular officer out of the public moneys, as a debt due to Her Majesty, either by ordinary process of law or in the manner in which seamen are hereby enabled to recover wages; and such expenses, if defrayed by the seaman or apprentice, shall be recoverable as wages due to him." It will be contended on the other side, that that section applies only to sales effected abroad. That, however, cannot have been the intention of the legislature. [COCKBURN, C. J.—The grammatical construction of the words undoubtedly is so. It may be that the ship is sold to foreign owners, and that a foreign captain is put in command.] The whole of the provisions of this part of the act show that it was the intention of the legislature to transfer to the new owners all the liabilities of the ship: and this is obviously just, seeing that they will receive the whole of the freight on the completion of the voyage. Besides, independently of the act, the former owners having disabled themselves from performing the contract with the crew, the latter were discharged from the performance of the contract on their part: Planché *v.* Colburn, 8 Bingh. 14 (E. C. L. R. vol. 21), 1 M. & Scott 51 (E. C. L. R. vol. 28), 5 C. & P. 58 (E. C. L. R. vol. 24); Keys *v.* *Harwood, 2 C. B. 905 (E. C. L. R. vol. 52): but, having performed [*784

services on board the vessel after the defendant had become the owner, they would be entitled, in the absence of any new contract, to recover upon a quantum meruit in respect of the services actually performed by them since the transfer of the ownership: Jesse *v.* Roy, 1 C. M. & R. 316.† Apart from the statute, the purchaser of the ship was not bound to continue the services of the crew; but, having by his accredited agent done so, he is responsible. The fact of the plaintiff's having been allowed to remain doing duty on board the vessel under one who must be assumed to have been the defendant's agent, created a contract between them which would at all events entitle the plaintiff to sue for wages pro ratâ. [WILLES, J.—Two questions arise,—first, whether there was any contract, express or implied, with the new owner,—secondly, whether, if there was a contract, it was upon the terms of the former contract, or upon a quantum meruit.] In Hillyard *v.* Mount, 3 C. & P. 93 (E. C. L. R. vol. 14), by a clause in the ship's articles of a South Sea whaler, the seamen serving on board were to lose their wages if they did not return with the ship to the port of London: after serving thirty-seven months, some of the seamen were, with the consent of the captain, exchanged into another ship for others belonging to that ship; and it was held, that, if these seamen lost their wages under the articles, they might recover a reasonable compensation for their services, on the count for work and labour. Hartley *v.* Harman, 11 Ad. & E. 798 (E. C. L. R. vol. 39), 3 P. & D. 567, was also referred to.

Edward James, Q. C., and *Kemplay*, in support of the rule.—The plaintiff shipped on board the Constance Emma for a voyage from Aden to Suez, and thence to Bombay or Moulmein. The circumstance of the *785] defendant having at Liverpool become the purchaser of *the vessel whilst at Suez, did not constitute the master or the mate his agent: nor was there any evidence of any adoption by the plaintiff of their acts. The mere act of transfer clearly does not make the captain agent for the transferree: Mitcheson *v.* Oliver, 5 Ellis & B. 519 (E. C. L. R. vol. 85); Myers *v.* Willis, 17 C. B. 77 (E. C. L. R. vol. 84). [COCKBURN, C. J.—Must not the transferree be taken to adopt the master as his agent until some communication can take place? Many disastrous consequences might result from a contrary doctrine.] How can the master be said to be agent to a man with whom he has had no previous communication? The seaman is not left without remedy: the master is always liable to him for wages. Cutter *v.* Powell, 6 T. R. 320, is a distinct authority to show that a seaman can claim no wages either upon the special contract or upon a quantum meruit until the voyage is completed. The 205th section of the Merchant Shipping Act has nothing to do with the question. [WILLES, J.—Certainly not.] To entitle him to sustain this verdict, the plaintiff must make out an engagement, express or implied, on the part of the defendant to pay him wages de die in diem. Assuming that there was here a contract between Townsend the new master and the plaintiff, it must be taken to have been upon the footing of the original articles. No contract can be implied under such circumstances: Lamburn *v.* Cruden, 2 M. & G. 235 (E. C. L. R. vol. 40), 2 Scott N. R. 533. [WILLES, J.—Though the law will not imply such a contract, it by no means follows that a jury may not.] Nothing that passed with Townsend could warrant the jury in implying any new contract. [COCKBURN, C. J.—Does not the ques-

tion turn rather upon what took place before Townsend arrived out?] It is submitted not. There was no evidence to warrant the verdict.

COCKBURN, C. J.—I am of opinion that this rule should *be discharged, provided that the plaintiff will consent to the damages [*786 being reduced by so much of the wages as were covered by the period intervening between the date of the transfer of the ship to the defendant and the time when the notice of the change of ownership reached Suez, that is, when Parr arrived there and the fact of the transfer of the ship to the defendant became notorious to all parties concerned. I think there was evidence from which the jury might infer that Parr was the agent of the defendant, having gone out for the purpose of protecting the defendant's interests: and, Parr being there as agent of the defendant, the plaintiff, whose contract with the former owner was at an end, must be taken to have been adopted by Parr as a person doing a seaman's duty on board the ship; and the question is, what was the nature of the contract under which that duty was performed. I am very much disposed to think that a person who becomes the purchaser of a ship while at sea must be taken by intendment to adopt the master as his agent until his authority can be determined by the arrival of some one empowered by the new owner to supersede him; and therefore I think that Abernethy, the former master, or the mate, were authorized to engage the crew on behalf of the defendant. It is not necessary, however, to go to that extent on the present occasion, because I think there was evidence that this plaintiff was employed and performed service under a person having authority and acting as the agent of the defendant in that behalf. Conceding that a seaman engaged for a voyage must complete that voyage before he is entitled to claim any wages, here it seems to me that no such question arises, because the original contract was put an end to, and any services performed by the seamen after that event were performed under a new contract. It may well be, that, the original owner having put it out of his power *to perform his [*787 contract with the seamen, they might maintain actions against him: but, if the seamen chose to serve under some one else, it was perfectly competent to them to do so. Now, here, the plaintiff elected to continue on board the vessel in the service of the new owner. What was the nature of the contract under which such new services were performed? It is clear that there were no new articles; but it is suggested that the employment of the plaintiff must be assumed to have been under the terms of the old articles. If that were so, the plaintiff might be bound to complete the voyage before any claim for wages would arise: but it appears to me that there is no evidence from which we would be warranted in inferring that it was ever communicated to him that he was to continue his services on the terms of the old articles. There being, then, no special contract, and the plaintiff having performed services on board the defendant's vessel, and that under a person acting with the sanction and under the authority of the defendant, there was abundant evidence of an implied promise to pay the plaintiff a reasonable compensation for such services. I therefore think the plaintiff is entitled to retain his verdict for the amount of wages earned by him from the period when it became known at Suez that the defendant was the owner until he left the ship with the consent of the new master. With the deduction suggested, therefore, the verdict will stand.

WILLIAMS, J.—I also am of opinion that the verdict ought not to be disturbed, provided it be limited to the amount of wages accruing to the plaintiff after the time when the change of ownership was notified to him. I come to this conclusion because I think there was some evidence from which the jury might if so minded have implied an agreement on the *788] part of the defendant, *through his agent, to recompense the plaintiff for his services from that period. When Townsend the new master came out, he found the plaintiff doing duty on board the ship for the benefit of the owner; and he continued such service down to the 19th of April, 1856, when he finally left the ship. If it had been found as a fact that the plaintiff was engaged by Townsend for the remainder of the voyage, although he left with the consent of the master, I should have been of opinion that he was not entitled to recover. But an agreement was come to at the trial that the case should not go to the jury, but that the verdict should stand for the plaintiff if there was any evidence on which the jury might imply a contract which would entitle the plaintiff to recover on a quantum meruit. I think there was ample evidence to sustain the verdict for the amount mentioned. It is somewhat curious to observe that the conclusion we arrive at has nothing whatever to do with the controversy at the trial, but is quite independent of the construction to be put upon the provisions of the Merchant Shipping Act, of the question of desertion, and of the seaworthiness of the ship. All that has nothing to do with the ground upon which we decide this case, viz., that there was evidence from which the jury were warranted in implying a promise to pay the plaintiff for the services rendered by him on board the ship for the defendant, from the time he became aware of the change of ownership down to the time of his leaving her.

WILLES, J.—I also am of opinion that the verdict should stand for the amount for which it was taken, less 3*l.* 10*s.* for a month's wages. It is quite clear that the defendant bought the vessel with the view of getting possession of her and using her for his own purposes. It is just, there- *789] fore, to presume that it was *his intention to bear the burthen of the expenses incurred by the ship from that time, and that the people who were doing duty on board the vessel should continue to do duty as his servants. Immediately the notice of the change of ownership arrived out at Suez that intention was communicated to the sailors, and it was understood that the crew should continue to work the vessel as the servants of the new owner. That state of things might, I think, reasonably be supposed to continue until some agent should arrive out, authorized by the new owner to act for him. It appears that one Parr, who was properly treated as the defendant's agent, arrived at Suez on the 10th of January, 1856, and that, upon his arrival, Abernethy, the original master, left the vessel, the mate and the rest of the crew continuing on board. I think the jury would have been well warranted in coming to the conclusion that there was a new contract between the defendant and the plaintiff that the latter should be paid for his work from the time he received notice that the defendant had become the owner of the vessel. Assuming that to be so, I think the jury would have been well warranted in implying a contract between the plaintiff and the defendant under which the former would be entitled to recover wages pro ratâ from the time when the change of ownership was com-

municated to the crew until the contract was put an end to by mutual consent of the parties. The counsel for the defendant not having desired that question to be left to the jury, but having agreed that the verdict should stand for the plaintiff if the court should be of opinion that there was any evidence to support it, this rule must be discharged upon the sum for which the verdict was taken being reduced to 10*l.* 10*s.*, for wages from the time the change of ownership became known at Suez until the plaintiff left the ship.

*BYLES, J.—I am entirely of the same opinion; and I do not consider it necessary to add anything to that which has fallen from the rest of the court. [*790

Rule accordingly.

HENRY SHARNBORNE NATHANIEL MICKLETHWAIT *v.* The Rev. JOHN NATHANIEL MICKLETHWAIT.

John M.,—who possessed estates called the H., B., and T. estates, in Norfolk, and also other estates in Norfolk, Suffolk, Surrey, Middlesex, and London, and also in the county of Westmeath,—had three sons, John, Nathaniel, and Jonathan George.

On the marriage of his second son, Nathaniel, John M., by settlement of September, 1782, settled the H., B., and T. estates, after a prior life-estate to himself, and a provision as to pin-money for the intended wife, to the use of Nathaniel for life, remainder to such son of the marriage as Nathaniel should appoint, and, in default of appointment, to the use of the first and other sons of the marriage, in tail male, with remainder to the settlor in fee. There was issue of this marriage two sons, Nathaniel and Sotherton, the former of whom on the death (in 1786) of his father (no appointment having been made pursuant to the power) succeeded to the H., B., and T. estates, as first tenant in tail.

By his will, of December, 1797, John M. devised his other real estates,—to the use of his eldest son, John, for life, with remainder to his first and other sons successively in tail male; and, in default of such issue, to the use of such one of his two grandsons, Nathaniel and Sotherton, sons of his late son Nathaniel, as his son John should by deed or will appoint, for life, remainder to the first and other sons of such appointee successively in tail male, remainder, in default of issue, to the other of his two grandsons for life, remainder to the first and other sons of such grandson successively in tail male; and, in case of default of any such appointment by John, the testator devised the estates to the eldest of his two grandsons, Nathaniel, for life, with remainder to his first and other sons successively in tail male, with remainder, on failure of such issue, to his second grandson, Sotherton, for life, and to his sons successively in tail male; and, on failure of such issue, to his (the testator's) third son, Jonathan George, for life, and to his sons successively in tail male; remainder to the testator's own right heirs.

By an unattested codicil, the testator professed to revoke the foregoing devise so far as it regarded the estates in Surrey, Middlesex, and London, and to devise these to Jonathan George, in fee.

Upon the death of John M. (in 1799), his eldest son, John, entered into possession of the estates comprised in the will of 1797, and continued in possession until his death, in 1824.

In 1804, Nathaniel (grandson of John M.), being about to marry, executed what purported to be a marriage-settlement, to which John, his uncle, was a party,—whereby, after reciting the settlement of 1782, he covenanted, with the consent of his guardians, within three months after he should have attained the age of twenty-one, to settle and assure the H., B., and T. estates to the use of himself for life, and, after his decease, to the use and intent that his intended wife should during her life receive a jointure-annuity of 1000*l.*, and, subject thereto, to the use of himself in fee. In pursuance of this covenant, Nathaniel, by an indenture of the 28th of January, 1805, and a recovery suffered in pursuance thereof, barred the entail in these estates. The only issue of this marriage was a son, Nathaniel Waldegrave (afterwards Colonel M.).

In 1810, Nathaniel (grandson of John M.) being about to contract a second marriage, proposals for a settlement, to which John, the uncle, was a party, were drawn up and agreed to; and, on the 29th of November in that year, the latter, in exercise of the power given to him by the

will of 1797, appointed the estates thereby devised to Nathaniel, to hold according to the terms of that will. By the settlement thereupon made, Nathaniel conveyed the Hickling estate to trustees, to the use of himself for life, remainder to the intent that his intended wife, in case she should survive him, should receive thereout a jointure-annuity of 1000*l.*, and, subject thereto, to the use of the trustees for a term of 1000 years for securing the annuity and for raising 15,000*l.* for the portions of the younger children, and, subject thereto, to the use of himself in fee: and he further covenanted with the trustees, as soon as he should come into possession of the other estates by virtue of the will of 1797 and his uncle's appointment, to charge those estates with a further annuity of 500*l.* in favour of his intended wife, and, so far as he was able, he thereby limited and appointed to her the said annuity, to be payable out of the said estate.

There were several children of this marriage,—of whom the defendant in this action was the eldest, and the plaintiff the second.

John, the tenant for life under the will of 1797, having through his mother's family become possessed in fee-simple of certain real estates, and, amongst others, of one in Sussex called the Iridge estate, and being childless, in the year 1822 made his will, whereby,—after reciting his father's will, and his desire that the attempted codicil thereto should be confirmed, and the devise therein of the lands in Surrey, Middlesex, and London, to his brother Jonathan George, in fee, should be established,—proceeded to devise the Iridge estate to trustees, first, to the use of his nephew Sotherton for life, remainder to the first and other sons of the body of Sotherton successively in tail male; secondly, in default of such issue, to his (the testator's) brother Jonathan George for life, remainder to his nephew, John, eldest son of Jonathan George, for life, and to the first and other sons of John successively in tail male. Then followed two shifting clauses, the first of which provided, that, if the testator's nephew Nathaniel and his first or other son or sons, or his or their heirs, should, in the lifetime of Jonathan George, effectually confirm and establish the codicil to the will of 1797, by effectually conveying the lands in Surrey, Middlesex, and London to Jonathan George in fee, then the foregoing devise in favour of Jonathan George and of his son John and his first and other sons in tail male, was to become void, and, immediately on such event, or otherwise in default of issue of the testator's nephew John, the estate was to pass to the testator's great-nephew John Nathaniel (second son of his nephew Nathaniel) for life, remainder to the first and other sons of John Nathaniel, in tail male, remainder to the third, fourth, fifth, and every other son of his (the testator's) nephew Nathaniel (excepting always the eldest son), successively, in tail male, with remainder, in default of issue, to Jonathan George in fee.

Then followed the second shifting clause, upon which the contest mainly arose,—"And as by possibility it may so happen, that, from and after the second, third, fourth, or other younger son of my said nephew Nathaniel, or the heirs male of his or their respective body or bodies, shall, under the limitations aforesaid, have come into possession of my said hereditaments and real estate, the eldest or elder son of my said nephew Nathaniel, or the heirs male of his body, may die and become extinct, so that the second or other younger son of my said nephew Nathaniel, or the heirs male of the body of such second or other younger son, may become entitled to *the property settled on the marriage of the said Nathaniel, in the character of the then heir male of his body*,—now, in order to prevent the union of the two estates in the same person whilst there is in existence a younger son, or an heir male of the body of a younger son of my said nephew Nathaniel, I do by this my will direct and declare, that, in case the second, third, fourth, or other younger son, or the heirs male of the body of such younger son or sons, shall, by the death or failure of issue male of the eldest or other elder son, become entitled to the said settled property of my said nephew Nathaniel, as the heir male of his body, then the limitations in this my will in favour of such second or other younger son, so becoming entitled, shall immediately after such event cease and become void, and the next younger son of my said nephew Nathaniel, and the heirs male of his body, shall, under the limitations of this my will, become entitled to my hereditaments and real estate aforesaid, in such manner in every respect as if his next elder brother, or the issue male of his body, had been dead or become extinct."

John (the testator of 1822) died in 1824, and his nephew Sotherton thereupon entered into possession of the Iridge estate under the last-mentioned will; and his nephew Nathaniel entered into possession of the estates devised by the will of 1797.

In April, 1826, Nathaniel (nephew of the testator of 1822) and his eldest son Colonel M. conveyed the lands in Surrey, Middlesex, and London to Jonathan George, in fee, conformably to the terms of the first shifting clause of the will of 1822; whereupon, by virtue of the provisions of the will, the devise of the Iridge estate in remainder to Jonathan George and his sons in tail male became void, and the devise of that estate in remainder to Nathaniel (the testator's nephew) and his sons took effect.

Nathaniel (nephew of the testator of 1822) died in 1856, having previously devised his Hickling and other estates, subject to a term of years for raising a sum of money, to his eldest son, Colonel M., for life, with remainder to his sons successively in tail male, with remainder, on failure of such issue, to his second son (the defendant), for life, with remainder to his sons successively in tail male, with a like remainder to his third son (the plaintiff), with remainders over.

Colonel M. (eldest son of Nathaniel, nephew of the testator of 1822) died in July, 1856, whereupon the defendant entered into possession of the H. and B. estates (the T. estate having long before been sold), and of the property devised by the will of 1797, with the exception of the estates in Surrey, Middlesex, and London, which had been conveyed to Jonathan George in 1826:—

Held, that the estates referred to in the (second) shifting clause were the estates which passed by the will of 1797, and which came to the defendant as first tenant in tail in remainder after the determination of the prior estate of his elder brother; that the character in which the defendant actually took the estates was intended to be described by the term "heir male of the body" of his father; and that, consequently, the contingency provided for by the shifting clause had happened, and so the plaintiff was entitled, as the next younger son of the testator's nephew Nathaniel, to the Iridge estate.

THIS was an action of ejectment for the recovery of certain property in Sussex, being part of the Iridge estate comprised in and devised by the will of John *Micklethwait, the testator of 1822, hereinafter mentioned. The defendant appeared and defended for the whole [*791 of the property mentioned in the writ; and by a judge's order made by consent under the provisions *of the Common Law Procedure [*792 Act, 1852, the following case was stated for the opinion of the court:—

In the year 1782, a marriage was solemnized between Nathaniel Micklethwait, second son of John Micklethwait of Beeston St. Andrew, in the county of Norfolk (which said John Micklethwait is hereinafter described as "the testator of 1797," and which said Nathaniel Micklethwait is hereinafter described as "Nathaniel Micklethwait No. 1"), and Sarah Branthwayt; and, upon the occasion of such marriage, a marriage-settlement, bearing date the 11th of September, 1782, was executed between the said John Micklethwait (the testator of 1797) and the said Nathaniel Micklethwait No. 1, of the first part, Mary Branthwayt and the said Sarah Branthwayt, of the second part, John Blofield and John Micklethwait the younger (hereinafter described as "the testator of 1822"), of the third part, and Francis Long and Miles Sotherton Branthwayt of *the fourth part,—whereby certain estates in the [*793 county of Norfolk, known and hereinafter described as the "Hickling estate" (of about the value of 2220*l.* per annum), the "Beeston estate" (of about the value of 470*l.* per annum), and the "Tunstall estate" (of about the value of 820*l.* per annum), being the property comprised in the marriage-settlement of the 18th of January, 1804, hereinafter mentioned, were settled by the said John Micklethwait the father, the testator of 1797, to the use as to the Tunstall and Beeston estates, of himself for life, and, as to the Hickling estate, and, after the decease of the said John Micklethwait (the father, and testator of 1797), as to the Tunstall and Beeston estates, to the use of the said Francis Long and Miles Sotherton Branthwayt for a term of ninety-nine years, if the said Nathaniel Micklethwait No. 1 and Sarah Branthwayt should so long live, for raising pin-money for the said Sarah Branthwayt during the joint lives of the said Nathaniel Micklethwait No. 1 and Sarah Branthwayt, and, subject to the said term, to the use of the said Nathaniel Micklethwait No. 1, for his life, with a limitation to the use of the said

John Blofield and John Micklethwait (the testator of 1822) and their heirs, during his life, to support contingent remainders; remainder to the use and intent that the said Sarah Branthwayt might receive during her life a jointure annuity of 600*l.*, with the usual powers of entry and distress for recovering the same; remainder to the use of the said Francis Long and Miles Sotherton Branthwayt for the term of 1000 years, upon trusts therein contained for raising 10,000*l.* for the portions of younger children (and which has been since raised and paid, and the said term surrendered); with remainder to the use of such one of the sons of the said Nathaniel Micklethwait No. 1 on the body of the said Sarah
*794] Branthwayt to be begotten, and *the heirs of his body, as the said Nathaniel Micklethwait No. 1 should by deed or will appoint, and, in default of such appointment, to the use of the first son of the body of the said Nathaniel Micklethwait No. 1 on the body of the said Sarah Branthwayt to be begotten, and the heirs of the body of such first son, with remainder to the second son of the body of the said Nathaniel Micklethwait No. 1 on the body of the said Sarah Branthwayt to be begotten, and the heirs of the body of such second son, with remainders over to the third, fourth, fifth, and every other son and sons of the said Nathaniel Micklethwait No. 1 and Sarah Branthwayt successively, and the heirs of their bodies respectively; with remainder to the said John Micklethwait (the testator of 1797), in fee.

The said John Micklethwait (the testator of 1797), being at the time of making his will hereinafter mentioned, and at the time of his death, seised in fee simple of certain other estates in the counties of Norfolk, Suffolk, Essex, Middlesex, and Surrey, and in the cities of London and Norwich, and in the county of Westmeath, in Ireland (being the property devised by the will next hereinafter mentioned), made his will, bearing date the 4th of December, 1797, duly executed and attested in manner then by law required to pass real estate, and thereby devised the said estates as follows, that is to say, To the use of his eldest son, the said John Micklethwait, the testator of 1822, for life, with a limitation to trustees and their heirs during his life to support contingent remainders; remainder to the use of his first and other sons successively in tail male; and, in default of such issue, then (in case such limitation, direction, or appointment of the said hereditaments and premises should be made by his said son John Micklethwait as was thereinafter men-
*795] tioned) to the use and behoof of such one of them his *two grandsons Nathaniel Micklethwait No. 2 and Sotherton Branthwayt Micklethwait (the sons of his said late second son Nathaniel Micklethwait No. 1 deceased), as his the testator's said son John Micklethwait should during his lifetime, by any deed or deeds, writing or writings, with or without power of revocation, under his hand and seal, to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses, or in or by his last will and testament in writing, or any codicil thereto, to be by him signed, sealed, and published in the presence of and to be attested by three or more credible witnesses, limit, direct, or appoint the same manors, hereditaments, and premises unto, To hold the same unto such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of

waste (other than voluntary or negligent waste in pulling or letting down houses or buildings without rebuilding or repairing the same); and, from and after the determination of the said estate for life of such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, by forfeiture or otherwise in the lifetime of such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, to the use of the said trustees and their heirs during the natural life of such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed, as aforesaid, upon trust to support contingent remainders, but nevertheless to permit and suffer such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, and his assigns, *during his natural life, to receive and take the rents, [*796
issues, and profits of the said premises to and for his and their own use and benefit: and, from and after the decease of such one of them his said two grandsons to whom the said premises should be limited, directed, or appointed as aforesaid, then to the use and behoof of the first son of the body of such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, in default of such issue, to the use and behoof of the second, third, fourth, fifth, and all and every other the son and sons of the body of such one of them his said two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, lawfully begotten, severally, successively, and in remainder one after another, in order and course as they and every of them should be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such last-mentioned son and sons lawfully issuing, the elder of such sons and the heirs male of his body lawfully issuing being always preferred and to take before the other and younger of such son and sons and the heirs male of his and their body and bodies lawfully issuing: and, for default of all such issue, to the use of the other of them his said two grandsons to whom the said premises should not be so limited as aforesaid for his life, with a limitation to the said trustees and their heirs during his life to support contingent remainders, and remainder to the use of his first and other sons successively in tail male: But, in case no such limitation, direction, or appointment of the said hereditaments should be made by his the said testator's son as aforesaid in favour of one or either of his said two grandsons, then *and after the [*797
decease and failure of issue male of his said son John, the said testator devised all the said premises to the use of his said grandson, the said Nathaniel Micklethwait No. 2, during his life, with a limitation to the said trustees and their heirs during his life, to support contingent remainders, and with remainder to the use of his first son and the heirs male of his body; and, in default of such issue, to the use of the second, third, fourth, fifth, and every other the son and sons of the body of the said Nathaniel Micklethwait No. 2, severally and successively, one after another, as they should be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of such son and sons, the elder of such sons and the heirs male of his body being

always preferred and to take before the younger of them and the heirs male of his body; with remainders, on failure of all such issue, to the said Sotherton Branthwayt Micklethwait for life, and his sons successively in tail male; and, on failure of such issue, to the testator's son Jonathan George Micklethwait for life, and his sons successively in tail male; and, on failure of such issue, to the testator's own right heirs: And the said testator by his said will declared, that, notwithstanding any of the aforesaid uses, it should be lawful for his said sons and grandsons when and as they respectively should respectively be in the actual possession of his said manors and estates by virtue of the limitations thereinbefore contained, by deed, with or without power of revocation, to be by them, so respectively in possession, signed, sealed, &c., and attested as therein mentioned, to limit or appoint unto or in trust for any such woman as they his said sons and grandsons respectively in possession as aforesaid might thereafter happen to marry, for her life respectively, in full or in part of her jointure, any annual sum not
*798] exceeding 500*l.*, to be *issuing out of the same hereditaments, or a competent part thereof, with such powers for the recovery thereof, and such terms of years as usual.

By a codicil to his said will, bearing date the 26th of February, 1799,—but which was not executed in manner required by law to pass real estate, the said John Micklethwait professed to revoke the above devise so far as regarded the estates in Surrey, Middlesex, and London, and to devise his last-mentioned estates to his son Jonathan George Micklethwait, in fee.

The said John Micklethwait (the testator of 1797) died on the 27th of February, 1799, without having revoked or altered his said will, leaving John Micklethwait (hereinafter described as the testator of 1822), his eldest son and heir-at-law, and the said Jonathan George Micklethwait, his third son, him surviving. The second son of the said John Micklethwait (the testator of 1797), being the said Nathaniel Micklethwait (No. 1), party to the said marriage-settlement of the 11th of September, 1782, died in the lifetime of his father, some time in the year 1786, without having made any appointment of the estates comprised in the said settlement of 1782. Upon the death of the said John Micklethwait (the testator of 1797), the said John Micklethwait (the testator of 1822) entered into possession of the estates devised by the said will of the 4th of December, 1797, and continued in such possession until his death, as hereinafter mentioned. The said Nathaniel Micklethwait (No. 1) had two sons only, viz., Nathaniel Micklethwait (his eldest son), hereinafter described as Nathaniel Micklethwait No. 2, and who upon the death of his father entered as tenant in tail into possession of the estates comprised in the settlement of 1782, and Sotherton Branthwayt Micklethwait, afterwards known as Sir Peckham Micklethwait, Baronet.

*799] *The said Nathaniel Micklethwait (No. 2), on the 26th of January, 1804, intermarried with the Lady Maria Wilhelmina Waldegrave; and a settlement was executed upon such marriage, bearing date the 18th of January, 1804.

By this settlement, which was made between the said Nathaniel Micklethwait (No. 2) of the first part, the said John Micklethwait the son, and Miles Sotherton Branthwayt, Esq. (who in the said settlement

are stated to be the guardians of the said Nathaniel Micklethwait (No. 2), of the second part, Charles Marquis Cornwallis, Elizabeth Laura Countess Dowager of Waldegrave, Heneage Earl of Aylesford, William Lord Radstock, and Thomas Berney Brampston, Esq. (therein described as the guardians of Lady Maria), and the said Lady Maria, of the third part,—after reciting the settlement of the 10th and 11th of September, 1782,—the said Nathaniel Micklethwait (No. 2), with the consent of his said guardians, covenanted and agreed, within three months after he attained twenty-one, to settle and assure the said Hickling, Tunstall, and Beeston estates (and to which he is therein stated to be then entitled in fee-tail general in possession under his said parents' marriage settlement), subject to the said term of 1000 years created by such settlement), To the use of himself for life, and, after his decease, To the use and intent that Lady Maria should during her life receive a jointure annuity of 1000*l.*, with the usual powers of entry and distress, and a term of years for securing the same, and, subject thereto, To the use of himself, the said Nathaniel Micklethwait (No. 2), in fee. The John Micklethwait party thereto of the second part, described as guardian of the said Nathaniel Micklethwait (No. 2), is the said testator of 1822. There was issue of this marriage one child only, Nathaniel Waldegrave John Branthwayt (hereinafter *described as Colonel Micklethwait), born on the 14th of February, 1805: and the said Lady Maria Wilhelmina Waldegrave died on the same day. [*800

By an indenture of the 28th of January, 1805, and a recovery suffered in pursuance thereof, the said Nathaniel Micklethwait (No. 2), having previously attained the age of twenty-one years, in manner then required by law, barred the entail in the estates comprised in the said indentures of 1782, and 18th of January, 1804, and limited the uses thereof to himself, in fee simple.

The Tunstall estate was sold by the said Nathaniel Micklethwait (No. 2), and conveyed on the 8th of December, 1809.

In the month of October, 1810, a marriage was contemplated between the said Nathaniel Micklethwait (No. 2) and the Honourable Charlotte Marianne Harriett Rous, eldest daughter of John, Lord Rous; and, upon the treaty for such marriage, the following proposals were made by the said Nathaniel Micklethwait (No. 2) and John Lord Rous, and were (subject to the alterations which appear in the same) approved of and signed by the said John Micklethwait, the testator of 1822:—

"Proposals for a settlement upon the intended marriage between Nathaniel Micklethwait, Esq., of Beeston, in the county of Norfolk, and the Honourable Charlotte Marianne Harriett Rous, the eldest daughter of the Right Honourable John Lord Rous, by Charlotte Maria Lady Rous, his present wife, late Charlotte Maria Whittaker.

"Lord Rous proposes on the day of marriage to pay to Mr. N. Micklethwait 5000*l.* as Miss Rous's portion, which is to be in lieu and satisfaction of all claims which she might have as one of his lordship's younger children under or by virtue of the settlement made *upon his marriage with Lady Rous, and also in lieu of all legacies or bequests contained in any will made by his lordship previous to the intended marriage. [*801

"In consideration whereof, and for making a provision for Miss Rous and for the issue of the marriage, Mr. N. Micklethwait proposes to

charge his Hickling estate with a clear annuity of 1000*l.* to Miss Rous, in case she shall survive him, during her life, to be payable quarterly, and the first payment to be made on the first quarter-day which shall happen after his death; and with a further clear annuity of 500*l.* as an augmentation to the said provision in case John Micklethwait, Esq., of Newmarket (the uncle of Mr. N. Micklethwait) shall, by virtue of the power given to him by the will of John Micklethwait, Esq., his late father, deceased, by deed or will settle, appoint, or devise the estates therein mentioned to the use of Mr. N. Micklethwait or his issue; the first payment of such additional annuity of 500*l.* to be made on the quarter-day which shall first happen after the death of Mr. N. Micklethwait, in case he shall have come into possession of the said estates in his lifetime, but, if not, then on the first quarter-day next after such estates shall by virtue of such settlement, appointment, or will, come into the possession of his issue or representatives; and such additional annuity to be payable to Miss Rous during her life at the same times and together with the said original annuity of 1000*l.*

"Mr. N. Micklethwait also proposes to charge the said estates at Hickling with the sum of 25,000*l.* for the fortunes of the children of the intended marriage, to be equally divided amongst such children, if more than one, share and share alike, and, if only one, the whole to such only child, such fortunes to be raised and paid to, such children within ——— months after Mr. N. Micklethwait's decease, or when and as
*802] they shall *respectively attain the age of twenty-one years, which shall last happen, with such yearly sums for their maintenance from the time of his decease until such fortunes shall respectively become payable as the trustees to be named in the settlement shall deem necessary, not exceeding the sums following, viz., if only one child, ——*l.*, if two children, ——*l.* each, and, if three or more, ——*l.* each per annum.

"The said provision for Miss Rous to be in bar of dower.

"The settlement to contain all usual powers and provisions for raising and securing the payment of the said annuities and children's fortunes, and all other powers necessary for carrying the trusts of the settlement into effect.

"Memorandum. The following alterations in the above arrangements have been since proposed:—

"Mr. Micklethwait proposes, in pursuance of the power given to him by his father's will, immediately to appoint all the estates thereby devised to him to Mr. Nathaniel Micklethwait.

"Mr. Nathaniel Micklethwait to enter into articles whereby he will covenant as soon as he comes into possession, to settle 500*l.* per annum upon Miss Rous, pursuant to the power given by Mr. Micklethwait's will.

"Instead of 25,000*l.* to be secured upon the Hickling estate, only 10,000*l.* to be charged thereon.

"Miss Rous's portion of 5000*l.* to be vested in the funds; 5000*l.* on mortgage of Mr. Symond's estates at Felmingham; 500*l.* on mortgage of an estate at Necton, belonging to Mr. Collyer.

"To be vested in the names of trustees, in trust for raising the remainder of the children's portions.

"We approve of and agree to the above arrangement.

"JOHN MICKLETHWAIT.

*"Names of trustees proposed by Lord Rous and Mr. Mickle- [*803
thwait,—

"*For Miss Rous's annuity*,—T. S. Gooch, Esq., of Bramfield Hall, Suffolk; Abraham Whittaker, Esq., of Lyston House, in the county of Hereford.

"*For provision for younger children*,—Sotherton Branthwayt Micklethwait, of Lamberhurst, in the county of Sussex, Esq., William Hanbury, of Lamberhurst, in the county of Northampton, Esq."

In pursuance of such arrangement, the said John Micklethwait (the testator of 1822), on the 29th of November, 1810, executed the deed of appointment of that date under his hand and seal hereinafter set forth; and the same was duly sealed and delivered by him in the presence of and attested by two credible witnesses, in manner required by the said will of the 4th of December, 1797.

The following is a copy of the deed of appointment of the 29th of November, 1810:—

"To all to whom these presents shall come, I, John Micklethwait, of Newmarket, in the county of Cambridge, Esq., send greeting: Whereas John Micklethwait, late of Beeston St. Andrew, in the county of Norfolk, Esq. (my late father), did, in and by his last will and testament, bearing date the 4th of December, 1797, and duly executed and attested in such form and manner as the law requires for the passing freehold estates (amongst other things), give and devise (charged as in the said will is mentioned) all and every his manors, advowsons, tithes, impropriations of tithes, capital and other messuages, farms, lands, tenements, and hereditaments whatsoever, situate, lying, and being in the several counties of Norfolk, Suffolk, Essex, Middlesex, and Surrey, and in the cities of London and Norwich, and also in the county of Westmeath, in Ireland, whether the same were freehold or copyhold *or of any other [*804
nature or tenure whatsoever; And also all other his manors, messuages, lands, tenements, hereditaments, and real estate whatsoever in the kingdoms of Great Britain and Ireland whereof or whereunto he was seised or entitled in possession, reversion, remainder, expectancy, or otherwise; And all his estate, right, title, and interest of, in, and to the same and every part and parcel thereof, from and immediately after his decease, unto and to the use of his eldest son, me, the said John Micklethwait, and my assigns, for and during the term of my natural life, without impeachment of waste (other than such waste as in the said will is mentioned), with remainder to trustees during my life to preserve contingent remainders, with remainders from and after my decease To the use of the first and all other son and sons of my body lawfully begotten, or to be begotten, in tail male, with remainder, for default of such issue (in case such limitation, direction, or appointment of the said hereditaments and premises should be made by me as was therein and as is hereinafter mentioned), to the use and behoof of such one of them his the said testator's two grandsons, Nathaniel Micklethwait and Sotherton Branthwayt Micklethwait (the sons of the said testator's then late second son Nathaniel Micklethwait), as I the said John Micklethwait should during my lifetime by any deed or deeds, writing or writings, with or without power of revocation, under my hand and seal, to be by

me sealed and delivered in the presence of and to be attested by two or more credible witnesses, or in or by my last will and testament in writing, or any codicil thereto, to be signed, sealed, and published in the presence of and to be attested by three or more credible witnesses, limit, direct, or appoint the same manors, hereditaments, and premises unto, To hold the same unto such one of them his the said testator's two
*805] grandsons to *whom the said premises should be so limited, directed, or appointed as aforesaid, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste (other than such waste as in the said will is mentioned); with remainder to trustees during the life of such one of them his the said testator's two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, to preserve contingent remainders; with remainder from and after the decease of such one of them his the said testator's two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, To the use of the first and all other son and sons of the body of such one of them his the said testator's two grandsons to whom the said premises should be so limited, directed, or appointed as aforesaid, lawfully to be begotten, in tail male, with divers remainders over, for default of such issue, as in and by the said last will and testament, on reference being thereto had, may more fully and at large appear: And whereas the said John Micklethwait, the testator, departed this life on or about the 27th of February, 1799, without altering or revoking his said last will and testament: Now know ye that I the said John Micklethwait, the son of the said testator John Micklethwait, deceased, in pursuance and exercise and execution of the power and authority to me given and reserved in and by the said recited or in part recited last will and testament of the said John Micklethwait, deceased, and by force and virtue of the same and of all and every other power and powers, authority and authorities, in me being or vested, or in any wise enabling me thereunto or in this behalf, have limited, directed, or appointed, and by this my deed or writing under my hand and seal by me sealed and delivered in the
*806] presence of and attested by the two credible *persons whose names are hereupon endorsed as the witnesses to the sealing and delivery of these presents by me, do limit, direct, and appoint unto the said Nathaniel Micklethwait, the eldest of the two grandsons of the said testator, all and every the aforesaid manors, advowsons, tithes, impropriations of tithes, capital and other messuages, farms, lands, tenements, hereditaments, and real estate whatsoever, late of the said John Micklethwait, the said testator, deceased, and by him in and by his said recited or in part recited last will and testament given and devised (from and after my decease, and in default of issue male of me the said John Micklethwait, as in the said will is mentioned), and in such case as in the said will is mentioned, to the use and behoof of such one of them his the said testator's two grandsons as I should in manner as therein and hereinbefore mentioned limit or appoint the same manors, hereditaments, and premises unto, To hold the same according to the form and effect of the said recited or in part recited will of the said John Micklethwait, my late father, deceased. In witness, &c.

"JOHN MICKLETHWAIT. NATHANIEL MICKLETHWAIT."

The said intended marriage between the said Nathaniel Micklethwait

(No. 2) and the said Charlotte Marianne Harriett Rous took place on the 27th of December, 1810; and, on the 26th of December, 1810, a marriage settlement of that date was executed, to the effect following:—

The settlement is made between the said Nathaniel Micklethwait (No. 2), therein described as of Beeston St. Andrew aforesaid, Esq., of the first part, John Lord Rous, of the second part, the Honourable Charlotte Marianne Harriett Rous, of the third part, Thomas Sherlock Gooch and Abraham Whittaker, Esqs., of the fourth part, and Sotherton Branthwayt Micklethwait and *William Hanbury, Esqs., of the fifth part. It recites the then intended marriage and the seisin [*807 of the said Nathaniel Micklethwait (No. 2) of the Hickling estates, the will of 1797, and the deed-poll of 1810. It then recites, that, upon the treaty for the said then intended marriage, it was proposed and agreed that the said John Lord Rous should at or before the solemnization thereof pay to the said Nathaniel Micklethwait (No. 2) the sum of 5000*l.* as and for the fortune or portion of the said Charlotte Marianne Rous, his daughter, which it was agreed should be taken and considered in lieu and full satisfaction of all claims which the said Charlotte Marianne Harriett Rous might have as one of the younger children of the said John Lord Rous under or by virtue of the settlement made upon his marriage with the said Charlotte Maria Lady Rous, his then wife, and also in lieu of all legacies or bequests mentioned and bequeathed to her in any will made by the said John Lord Rous previous to the said then intended marriage: and the said Nathaniel Micklethwait, in consideration thereof and of the said marriage, and for making a provision for the said Charlotte Marianne Harriett Rous, his then intended wife, in case she should happen to survive him, and for the issue of the said then intended marriage, did agree to settle and convey his said estates in Hickling and adjoining parishes in Norfolk thereinafter released, To the uses and upon and for the trusts, intents, and purposes thereinafter mentioned concerning the same; and also to enter into a covenant to charge the said hereditaments and premises so devised by the said will of the said John Micklethwait, deceased, in case and when and so soon as he should come into possession thereof by virtue of the said will and deed of appointment, with the payment of an annual sum or yearly rent-charge of 500*l.* to the said Charlotte Marianne Harriett *Rous, his then intended wife, during her life, in case she should [*808 happen to survive him the said Nathaniel Micklethwait (No. 2), as an augmentation of her jointure: And the said Nathaniel Micklethwait (No. 2) did also agree to pay to the said Thomas Sherlock Gooch and Abraham Whittaker, previous to the solemnization of the said marriage, the sum of 10,000*l.* upon the trusts thereinafter declared.

The settlement then contains a conveyance by the said Nathaniel Micklethwait (No. 2) of the said Hickling estate to trustees, to the use of himself for life, remainder to the intent that Lady Charlotte, in case she should survive him, might receive thereout a jointure annuity of 1000*l.* for her life, with the usual powers of entry and distress for securing and enforcing the payment of the same; and, subject thereto, to the use of the said Thomas Sherlock Gooch and Abraham Whittaker for one thousand years, to be computed from the decease of the said Nathaniel Micklethwait (No. 2) for securing the payment of the said

annuity and for raising 15,000*l.*, for the portions of the younger children of the said then intended marriage; and, subject thereto, To the use of the said Nathaniel Micklethwait (No. 2), in fee. The said Nathaniel Micklethwait (No. 2) then by the said indenture of settlement covenanted with the said trustees that he would in case and when and as soon as he should by virtue of the said therein recited will of the said John Micklethwait, his grandfather (the testator of 1797), and of the said deed of appointment of the 29th of November, 1810, be in the actual possession of the manors, messuages, lands, tenements, hereditaments, and premises thereby devised to the said John Micklethwait the son (the testator of 1822) as aforesaid, well and effectually limit and appoint, and so far as he could he did thereby limit and appoint, unto
*809] the said Lady Charlotte, for her life, in *augmentation of the jointure thereinbefore provided for her, one annual sum or yearly rent-charge of 500*l.*, to be payable out of the said devised premises, and to commence immediately after the decease of the said Nathaniel Micklethwait (No. 2); and the said Nathaniel Micklethwait (No. 2) also by the said settlement covenanted that he would limit and appoint such powers and remedies for recovery of the said annuity when in arrear, and such term or terms of years for the better securing the payment thereof, to take effect immediately after his decease, as were usual and necessary and expedient in that behalf, and warranted by the said power.

On the 23d of May, 1812, the said Nathaniel Micklethwait (No. 2) executed indentures of lease and release and settlement dated the 22d and 23d of May, 1812, to the following effect:—

The said Nathaniel Micklethwait (No. 2) thereby settled certain estates in Faversham and other parishes in Norfolk, of about the value of 2520*l.* per annum; and Elizabeth Branthwayt, widow, who was entitled for her life in part of the same, concurred with him in so doing: and the said Nathaniel Micklethwait (No. 2) thereby also settled the said Beeston estates comprised as aforesaid in the said settlements of 1782 and 1804, to which he was then entitled in fee-simple under the recovery deed of 1805, to the uses following, viz., as to the parts of the said Faversham and other estates to which the said Elizabeth Branthwayt was as aforesaid entitled for her life, to the use of her and her assigns for her life, by way of restoration and in confirmation of her said estate for life; and, as to the other estates, and, after the decease of the said Elizabeth Branthwayt, as to the parts of the said estate limited to her for her life, to the use of the said Nathaniel Micklethwait
*810] (No. 2) and his assigns for his life, with a *limitation to trustees during his life to support contingent remainders; remainder to the use of the said Colonel Micklethwait and his assigns for his life, with a limitation to trustees during his life to support contingent remainders; remainder to the use of the first and other sons successively of the said Colonel Micklethwait in tail male; and, on failure of such issue, as to the parts of the said estates in Faversham, in which the said Elizabeth Branthwayt had a life interest as aforesaid, to the use of the said Nathaniel Micklethwait (No. 2), his heirs and assigns, but, if he died without issue male in her lifetime (which did not happen), then to the uses subsisting therein before the execution of the said indenture of settlement: And, as to all other the said estates thereby settled, com-

prising the said Beeston estates, to the use of the said Nathaniel Micklethwait (No. 2), his heirs and assigns.

On the 24th of October, 1822, the said John Micklethwait (the testator of 1822) made his will, bearing date that day, duly executed and attested in manner then by law required to pass real estate, of which the following is a copy:—

"This is the last will and testament of me, John Micklethwait, of Iridge Place, in the parish of Salehurst, in the county of Sussex, Esq., touching the disposition of such temporal estate which by the blessing of Divine Providence I have been endowed with, and whereof I have an absolute right of disposal. In the first place, it is my particular wish and desire that all my just debts, whether on mortgage, bond, simple contract, or otherwise, shall be paid off and discharged: and, for the greater facility thereto, and in order the better to secure the payment of the several pecuniary legacies by me hereinafter given and bequeathed, I give and devise unto my friends William Alexander Moreland, of, &c., and John Law Hodges, of, &c., and their *heirs, all that my messuage or tenement, buildings, farm, lands, hereditaments, and premises, with their rights, members, and appurtenances, situate, lying, and being in the parish of Sandhurst, in the said county of Kent, and now in the tenure or occupation of James Collens, his assigns or under-tenants; and also all that my messuage or tenement, buildings, farm, lands, hereditaments, and premises, with their rights, members, and appurtenances, situate, lying, and being in the parish of Hawkhurst, in the said county of Kent, and now in the tenure or occupation of Edmund Springett, his assigns or under-tenants; and all other my messuages, lands, tenements, hereditaments, and premises, situate, lying, and being in the said parishes of Sandhurst and Hawkhurst, or either of them, To hold the same to them the said W. A. Moreland and J. L. Hodges, and their heirs, upon this special trust and confidence nevertheless in them reposed,—that they the said W. A. Moreland and J. L. Hodges, or the survivor of them, or the heirs or assigns of such survivor, do and shall as soon as conveniently may be after my decease, sell and dispose of my said messuages or tenements, buildings, farms, lands, hereditaments, and premises, situate in the several parishes of Sandhurst and Hawkhurst aforesaid, either together or in lots or parcels, and by public auction or private contract, as they or he in their or his discretion shall judge most prudent, for the best price or prices that can reasonably be had or gotten for the same: and upon further trust to pay and apply the net moneys to arise by such sale, and the rents and profits to be received in the mean time and until such sale, in aid of my personal estate, in, for, and towards the discharge and satisfaction of all my just debts, whether on mortgage, bond, simple contract, or otherwise, and also in, for, and towards the payment and satisfaction of the several pecuniary legacies *by me hereinafter given and bequeathed; and, in case of any surplus of the said trust moneys from and after such payment, discharge, and satisfaction as aforesaid, then I give and bequeath such surplus money unto my nephew Sotherton Branthwayt Micklethwait, his executors and administrators, to and for his and their own sole and absolute use and benefit: And, the more effectually to enable my said trustees, or the survivor of them, or the heirs or assigns of such survivor, to sell and dispose of my said mes-

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suages or tenements, buildings, farms, lands, hereditaments, and premises, situate in Sandhurst and Hawkhurst aforesaid, I do hereby declare that no purchaser or purchasers thereof, or of any part thereof, shall be obliged to look to or concern himself, herself, or themselves, after payment of his, her, or their purchase-money or purchase-moneys, with the application thereof or of any part thereof, but that the receipt or receipts of my said trustees, or the survivor of them, or the heirs of such survivor, shall at all times be an effectual discharge or discharges to such purchaser or purchasers for such and so much of his, her, or their purchase-money or purchase-moneys as in such receipt or receipts shall be expressed or acknowledged to be received: And I do hereby order and direct that my said nephew Sotherton Branthwayt Micklethwait shall have an election of becoming the purchaser of my said estates so given and devised in trust to be sold as aforesaid at a price to be affixed by the fair valuation of two persons, one to be chosen by my said trustees or the survivor of them, or the heirs of such survivor, and the other by the said Sotherton Branthwayt Micklethwait, or in case of a difference between them, then by the valuation of a third person to be chosen by the said two referees, upon condition that he the said Sotherton Branthwayt Micklethwait shall signify his wish to become such purchaser within six
*813] *months from the time of my decease, and provided he the said Sotherton Branthwayt Micklewait shall complete such purchase within twelve months from the time of my decease: And whereas my much respected father, John Micklethwait, deceased, did by his will, bearing date the 4th of December, 1797, give and devise (among and together with several other estates) certain messuages, lands, and hereditaments situate in the counties of Surrey and Middlesex, and in the city of London, therein particularly described, to the use of me for life, with remainder to the use of my heirs in tail male, and, in default of such issue, to the use of my nephew Nathaniel Micklethwait, for life, with remainder to his heirs in tail male, or of my nephew Sotherton Branthwayt Micklethwait, for life, with remainder to his heirs in tail male, authorizing or giving to me the power of making the election as to which of my said nephews and his heirs in tail such limitations in remainder should first pass in the event of my decease without leaving any male issue: And whereas, by a codicil to the said will, dated the 26th of February, 1799, my said father did attempt and intend to revoke and make void the devise contained in his said will so far as regarded the said messuages, lands, and hereditaments situate in the counties of Surrey and Middlesex, and in the city of London; and he did thereby attempt and intend to give and devise the same unto my brother Jonathan George Micklethwait, his heirs and assigns, for ever; but, such codicil having been published in the presence of and attested by two witnesses only, the same was inoperative as to the above-mentioned revocation and devise therein: And whereas, under and by virtue and in exercise of the power and authority to me given in and by my said father's will, I have heretofore made an election by limiting and directing from and immediately after my decease without issue male,
*814] *all and every the messuages, lands, tenements, hereditaments, and premises devised by the said will as aforesaid, unto my said nephew Nathaniel Micklethwait, for the term of his natural life, with remainder to his first and other sons and their heirs in tail male: never-

theless, it is my wish and desire that the said codicil to my father's will should be confirmed, and the devise therein of the said messuages, lands, and hereditaments situate in the counties of Surrey and Middlesex, and in the city of London, to my brother Jonathan George Micklethwait and his heirs and assigns for ever should be fully and legally established: And whereas it is my expectation that my nephew Edward Micklethwait will be provided for by his maternal relations: Now, I do hereby give, devise, and bequeath unto my nephew John Micklethwait (eldest son of my said brother Jonathan George Micklethwait) and his assigns, for and during the term of his natural life, one annuity or clear yearly rent-charge of 100*l.* sterling: Also, I give, devise, and bequeath unto my said nephew Edward Micklethwait (the other son of my said brother Jonathan George Micklethwait) and his assigns, for and during the term of his natural life, one annuity or clear yearly rent-charge of 50*l.* sterling: Also I give, devise, and bequeath unto my sister-in-law Mary Corthine, spinster, and her assigns, for and during the term of her natural life, one annuity or clear yearly rent-charge of 100*l.* sterling: Also, I give, devise, and bequeath unto Mary Pooke, of Salehurst, aforesaid, spinster, and her assigns, for and during the term of her natural life, one annuity or yearly rent-charge of 40*l.* sterling: All which said several annuities or yearly rent-charges I do direct shall be paid from and out of, and be charged on the hereditaments and real estate hereinafter given and devised, by two equal half-yearly payments, on Lady Day and Michaelmas Day in every year, and the first payment *thereof to begin and be made on such of the said days as shall next happen after my decease: And I do hereby order and [*815 direct, that, in case the said annuities or yearly rent-charges, or any or either of them, or any part thereof, shall be in arrear and unpaid over and above the space of thirty days from and after the several days above mentioned and appointed for payment thereof, it shall and may be lawful to and for the said John Micklethwait, Edward Micklethwait, Mary Corthine, and Mary Pooke, respectively, or their respective assigns, from time to time to recover and raise the same by distress and sale of the effects on all or any part of the said hereditaments and real estate so charged therewith, in like manner as rent may be recovered in case of non-payment: And, subject to and chargeable with the payment of the several annuities or yearly rent-charges aforesaid, and to the power and remedy for recovery thereof in manner as aforesaid, I give and devise all and every of my manors, messuages, farms, lands, tithes, tenements, hereditaments, and real estate whatsoever, whether in possession, reversion, remainder, or expectancy, and whether situate in the county of Sussex or elsewhere (except Sandhurst and Hawkhurst aforesaid), unto my aforesaid friends William Alexander Moreland and John Law Hodges, and their heirs, To hold the same unto the said William Alexander Moreland and John Law Hodges and their heirs for ever, To the several uses, upon the trusts, and under and subject to the powers, provisoes, and limitations hereinafter expressed and declared of and concerning the same, that is to say, To the use of my said nephew Sotherton Branthwayt Micklethwait, and his assigns, for and during the term of his natural life (without impeachment of waste); and, from and after the determination of that estate, To the use of the said William Alex-

*816] ander Moreland and John Law Hodges and *their heirs during the natural life of my said nephew Sotherton Branthwayt Micklethwait, in trust to support the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as the case may require, yet nevertheless to permit and suffer my said nephew Sotherton Branthwayt Micklethwait and his assigns to receive and take the rents, issues, and profits thereof during the term of his natural life; and, from and after his decease, to the use of the first son of the body of the said Sotherton Branthwayt Micklethwait lawfully begotten, and the heirs male of the body of such first son lawfully issuing; and, in default of such issue, to the use of the second, third, fourth, and all and every other son and sons of the body of my said nephew Sotherton Branthwayt Micklethwait lawfully to be begotten, severally, successively, and in remainder, one after another, in order and course as they shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons, and the heirs male of his and their body and bodies, being always to be preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies lawfully issuing: And, in default of such issue, To the use of my aforesaid brother Jonathan George Micklethwait, and his assigns, for and during the term of his natural life; and, from and after the decease of my said brother Jonathan George Micklethwait, then to the use of my said nephew John Micklethwait (the eldest son of my said brother Jonathan George Micklethwait), and his assigns, for and during the term of his natural life (without impeachment of waste); and, from and after the determination of that estate, to the use of the said William Alexander Moreland and *817] John *Law Hodges and their heirs, during the natural life of my said nephew John Micklethwait, in trust to support the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require, yet nevertheless to permit and suffer my said nephew John Micklethwait and his assigns to receive and take the rents, issues, and profits thereof during the term of his natural life; and, from and after his decease, to the use of the first son of the body of my said nephew John Micklethwait lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, in default of such issue, to the use of the second, third, fourth, and all and every other son and sons of the body of the said John Micklethwait lawfully to be begotten, severally, successively, and in remainder, one after another, in order and course as they shall respectively be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons, and the heirs male of his and their body and bodies lawfully issuing, being always to be preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies lawfully issuing: Provided, nevertheless, that, if my said nephew Nathaniel Micklethwait and his first or other son or sons, or his or their heirs, do and shall in the lifetime of my said brother Jonathan George Micklethwait, fully and effectually confirm and establish the aforesaid codicil to my father's will, by legally and effectually conveying and assuring the said messuages,

lands, and hereditaments situate in the counties of Surrey and Middlesex, and in the city of London, unto and to the use of my said brother Jonathan George Micklethwait, his heirs and assigns for ever, that then and in such case the *devise and limitation hereinbefore made in favour of my said brother Jonathan George Micklethwait for life, and of my [*818 said nephew John Micklethwait, his son, and the first and other sons of his body, in tail male as aforesaid, shall from thenceforth cease and become void, and immediately on such event, or otherwise in default of such issue as aforesaid of my said nephew John Micklethwait, then all and every of my aforesaid manors, messuages, farms, lands, tithes, tenements, hereditaments, and real estate in Sussex or elsewhere (except in Sandhurst and Hawkhurst aforesaid), are to go and pass to the use of my great-nephew John Nathaniel Micklethwait, second son of my said nephew Nathaniel Micklethwait, and his assigns, for and during the term of his natural life (without impeachment of waste); and, from and after the determination of that estate, to the use of the said William Alexander Moreland and John Law Hodges, and their heirs, during the natural life of the said John Nathaniel Micklethwait, in trust to support the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion may require, yet nevertheless to permit and suffer the said John Nathaniel Micklethwait and his assigns to receive and take the rents, issues, and profits thereof during the term of his natural life; and, from and after his decease, to the use of the first son of the body of the said John Nathaniel Micklethwait lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, in default of such issue, to the use of the second, third, fourth, and all and every other son and sons of the body of the said John Nathaniel Micklethwait, lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall respectively be in seniority of age and priority of birth, and the *several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such [*819 son and sons, and the heirs male of his and their body and bodies lawfully issuing, being always to be preferred and to take before the younger of such son and sons, and the heirs male of his and their body and bodies lawfully issuing: and, in default of such issue, to the use of the third, fourth, fifth, and all and every other son and sons (except the eldest son) of my said nephew Nathaniel Micklethwait lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall respectively be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons (except such eldest son) lawfully issuing, the elder of such son and sons (except as aforesaid), and the heirs male of his and their body and bodies, being always to be preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies lawfully issuing; and, in default of such issue, to the use of the right heirs of my said brother Jonathan George Micklethwait for ever; And, as by possibility it may so happen, that, from and after the second, third, fourth, or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of his or their respective body or bodies, shall, under the limitations aforesaid, have come into possession of my said hereditaments and real estate, the eldest or elder

son of my said nephew Nathaniel Micklethwait, or the heirs male of his body, may die and become extinct, so that the second or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of the body of such second or other younger son, may become entitled to the property settled on the marriage of the said Nathaniel Micklethwait, in the character of the *then heir male of his body; Now, in order *820] to prevent the union of the two estates in the same person, whilst there is in existence a younger son, or an heir male of the body of a younger son, of my said nephew Nathaniel Micklethwait, I do by this my will direct and declare, that, in case the second, third, fourth, or other younger son, or the heirs male of the body of such younger son or sons, shall, by the death or failure of issue male of the eldest or other elder son, become entitled to the said settled property of my said nephew Nathaniel Micklethwait, as the heir male of his body, Then the limitations in this my will in favour of such second or other younger son, so becoming entitled, shall, from and immediately after such event, cease and become void, and the next younger son of my said nephew Nathaniel Micklethwait, and the heirs male of his body, shall, under the limitations of this my will, become entitled to my hereditaments and real estate aforesaid in such manner in every respect as if his next elder brother, or the issue male of his body, had been dead or become extinct: And my will is, and I do hereby order and direct, that it shall and may be lawful to and for my said nephew Sotherton Branthwayt Micklethwait, my said nephew John Micklethwait, and the said John Nathaniel Micklethwait, and each and every of them, as and when they shall or may happen respectively to come into possession of my said manors, messuages, farms, lands, tithes, tenements, hereditaments, and real estate so limited in use to them respectively as aforesaid, by any writing or writings signed and sealed by them respectively in the presence of and to be attested by two or more credible witnesses, to demise and lease all or any part of the same manors, messuages, farms, lands, tithes, tenements, and real estate, to any person or persons whomsoever, for any term or terms not exceeding fourteen years, in possession, *and *821] not in reversion, so as upon every such lease and leases the best and most improved yearly rent or rents be reserved and made payable half-yearly or quarterly that can reasonably be obtained, without taking any fine, foregift, or other thing by way of premium for the same, and so as such lease or leases do contain the usual covenants and conditions on the part or parts of the lessee or lessees, and be not made dispunishable for waste by any express words therein contained, and so as the respective lessees do execute the original leases, or duplicates or counterparts thereof: And, in consideration of the great regard and respect which I have and bear for the family of my much-honoured mother, Elizabeth Micklethwait, deceased, before Elizabeth Peckham, spinster, through the benevolence of which family I am possessed of the greater part of my real estates in Sussex and Kent, I do by this my will order and direct that my said nephew Sotherton Branthwayt Micklethwait, and the several other person and persons (except my said brother Jonathan George Micklethwait) who shall in succession become entitled to my said manors, messuages, farms, lands, tithes, tenements, hereditaments, and real estates aforesaid, by virtue of the aforesaid limitations in this my will contained, shall severally and successively as they shall

come into the possession thereof, take the surname and bear the arms of Peckham jointly with those of Micklethwait, and shall for that purpose solicit for and obtain due license by His Majesty's sign-manual, and procure the same to be duly recorded in the Herald's Office of this kingdom: And, as touching my personal estate, I give and dispose thereof in manner following, &c., &c.: And I make, nominate, constitute, and appoint my said nephew Sotherton Branthwait Micklethwait sole executor of this my last will and testament," &c.

The said John Micklethwait (the testator of 1822) *was at the time of making his will, and at the time of his death, seised in [*822 fee-simple of certain estates in the county of Sussex, known as "The Iridge estates," being of the value of 2800*l.* per annum or thereabouts, and being a portion of the property devised by his said will.

The said John Micklethwait (the testator of 1822) died in the month of April, 1824, without having revoked or altered his said will, and without having had any children.

Up to about this period, Nathaniel Micklethwait, No. 2, resided at Beeston House, which was the family mansion of the Micklethwaits, and part of the property comprised in the settlements of 1782 and 1804 and 1812. There was no family residence on any of the estates devised by the will of 1797.

The property sought to be recovered in this action forms part of the said Iridge estates devised by the said testator of 1822.

At the time when the said John Micklethwait (the testator of 1822) made his said will, Messrs. Richard Owen Stone and William Owen Stone carried on business in partnership as solicitors at Mayfield, in Sussex, and were at that time the solicitors of the said John Micklethwait (the testator of 1822), and were employed by him to prepare his said will; and the said Richard O. Stone was one of the attesting witnesses to the execution thereof. Richard Owen Stone died in 1824; and William Owen Stone, his son and partner, continued the business, and took into partnership Mr. Donald Barclay, and they carried on business in partnership at the same office in Mayfield until William Owen Stone's death in 1839. After the death of William Owen Stone, Mr. Barclay continued the business, and subsequently took Mr. Henry King into partnership. They carried on their business at a different office from that in which *the business had been carried on during the lifetime of the Stones; [*823 and quantities of papers, including several papers which belonged to the Micklethwaits, were removed from the one office to the other. Among the papers which were so removed, two papers have been found. The first is in the handwriting partly of the said Richard Owen Stone, and partly of Benjamin Buss, who at that time was the clerk of the said Richard Owen Stone and William Owen Stone, and contains an exact copy of the said will of the said John Micklethwait (the testator of 1822), and is in fact the original draft from which the said will was engrossed for the purpose of being executed. The second paper was found folded up inside the first paper, and is entirely in the handwriting of the said Richard Owen Stone; but Benjamin Buss believes that certain pencil "ticks," one of which is placed against each clause in the paper, were put there by him. He does not recollect making the "ticks" or recognise them as being in his handwriting; but he thinks they are his,

because it would have been part of his duty to put them there. The following is a copy of the said second paper:—

"Disposal by testament.

"Devise estates in Sandhurst and Hawkhurst to W. A. Moreland and J. L. Hodges, in trust to sell and to apply proceeds in discharge of debts, and towards payment of pecuniary legacies, and to pay residue to S. B. Micklethwait, Esq., who is to have the election of becoming purchaser at a valuation [six instead of three months for election].

"Recite property settled on Mr. N. Micklethwait, and the expectation of nephew Edward Micklethwait's being provided for.

"Devise to nephew John, eldest son of Mr. J. G. Micklethwait, annuity of 100*l.*: to nephew Edward Micklethwait, annuity of 50*l.*: to Mrs. Corthine, an annuity of 100*l.*

*824] *"Subject to the above annuities, give the residue of real estates to trustees and their heirs.

"To the use of nephew S. B. M. for life;

"Remainder to his first and other sons in tail male: in default of such issue, to brother J. G. Micklethwait, for life;

"Remainder to nephew John Micklethwait, for life;

"Remainder to first and other sons of nephew John Micklethwait.

"Clause, if father's will confirmed as to the property in London and Croydon, the limitation to brother J. G. and to nephew and his first and other sons to immediately cease.

"In default of such issue of nephew John, or in the event of confirmation, which shall first happen, then to John Nathaniel Micklethwait (second son of nephew Nathaniel Micklethwait), for life;

"Remainder to his first and other sons in tail male. In default of such issue, remainder to the third, fourth, fifth, and all other (except the eldest son) of Nathaniel Micklethwait, in tail male.

"Proviso, as in codicil, to prevent the two estates, *i. e.* the one already settled on nephew Nathaniel and Mr. Micklethwait's estate getting into the possession of the same person.

"In default of all the issue of nephew Nathaniel (except his eldest son, or the issue of such eldest son),

"Then to brother J. G. Micklethwait, his heirs and assigns, for ever.

"Clause for letting leases as restricted.

"Clause also as to the taking the surname and bearing the arms of Peckham jointly with Micklethwait."

[Then followed the heads of the provisions as to the disposal of the personal estate of the testator.]

These two papers were to be treated as part of the case.

*825] *Upon the death of the said John Micklethwait (the testator of 1822), the said Sotherton Branthwayt Micklethwait, who was created a baronet, and was also known as Sir Peckham Micklethwait, entered into possession of the said Iridge estates under the said will of the 24th of October, 1822, and continued in possession thereof until his death without issue in September, 1853; and, upon such death of the said John Micklethwait (the testator of 1822), the said Nathaniel Micklethwait (No. 2) entered into possession of the estates devised by the said will of the 4th of December, 1797.

On the 6th of April, 1826, the said Nathaniel Micklethwait (No. 2) and the said Colonel Micklethwait did, in the lifetime of the said

Jonathan George Micklethwait, fully and effectually confirm and establish the said attempted codicil to the will of the said John Micklethwait (the testator of 1797), by legally and effectually conveying and assuring the said property situate in the counties of Surrey and Middlesex, and in the city of London, unto and to the use of the said Jonathan George Micklethwait in fee; and thereupon the devise and limitation contained in the said will of the said John Micklethwait (the testator of 1822) in favour of the said Jonathan George Micklethwait and of John Micklethwait his son, and the first and other sons of his body in tail male, ceased and became void.

The value of the estates devised by the will of 1797, exclusive of the portion conveyed to Jonathan George Micklethwait as before mentioned, is 4370*l.* per annum.

There was issue of the said marriage of the said Nathaniel Micklethwait (No. 2) and the said Charlotte Marianne Harriett Rous six sons, of whom John Nathaniel Micklethwait, the defendant in this action, was the eldest, and Henry Sharnborne Nathaniel Micklethwait, the plaintiff in this action, was the second. *Upon the death of the said [*826
Sir Peckham Micklethwait, the defendant entered into possession of the said Iridge estates under the said will of the 24th of October, 1822, and from thence hitherto hath been and still is in occupation and possession of the same.

The said Nathaniel Micklethwait (No. 2) died on the 6th of January, 1856; and, upon his death, the said Colonel Micklethwait entered into possession of the estates in the counties of Norfolk, Suffolk, and Essex, and in the city of Norwich, and in the county of Westmeath, devised by the said will of the 4th of December, 1797, and also the estates comprised in the settlements of 1804, and 1810, and 1812, severally mentioned in the will of the 29th of May, 1852, hereinafter referred to, and died on the 18th of July, 1856, without having been married, and without having barred the estate-tail in any of the property devised by the said will of the said John Micklethwait, the testator of 1797.

The said Nathaniel Micklethwait (No. 2) duly made and published his will, dated the 29th of May, 1852, executed so as to pass real estates; and thereby he devised his said manors and estates hereinbefore called the Hickling estates, and all other his estates belonging to him in fee-simple in possession, to trustees, for a term of years, for raising a sum of money therein mentioned; and, subject thereto, to his eldest son, the said Nathaniel Waldegrave John Branthwayt Micklethwait (called in this case Colonel Micklethwait), for life; with remainder to his first and other sons successively on tail male; and, in failure of his issue, the testator devised, not only the said several estates, but also the said manor and site of Faversham Hall, and estates in Faversham, Costessey, Drayton, Attlebridge, Ringland, Morton, Beeston, and Sprowston, comprised in and settled by the said indentures of the 22d and 23d of May, 1812, to his second son, the said John Nathaniel *Micklethwait, [*827
the defendant, for life; with remainder to his first and other sons successively in tail male; and, on failure of such issue, to his third son, the said Henry Sharnborne Nathaniel Micklethwait, the plaintiff, for life, with remainder to his first and other sons successively in tail male, with remainders over in like manner to the testator's other sons, daughters, and grandchildren successively for life, and to their children in tail;

And, after reciting that he was seised or entitled for his life of and to, not only the said manors, hereditaments, and real estates comprised in the said indentures of the 22d and 23d of May, 1812, but, also of and to divers other considerable real estates in England and Ireland, with remainders respectively to his said sons successively in tail male,—the said testator declared that the several gifts and devises thereinbefore contained of his said manors and estates thereinbefore devised to or in favour of his said sons respectively for life, were so made, and should be accepted by them respectively, upon condition that each and every of his said sons respectively who should after his decease become seised or entitled of and to the said manors and real estates of or to which he the said testator was so seised or entitled for his life as aforesaid for any estate in tail, should within twelve calendar months next after he should be in possession of the same, make and execute all such legal and proper deeds as should be requisite or proper, not only legally and effectually to bar and destroy such estate-tail, but also to settle and assure the said manors and real estates to the uses, estates, &c., thereinbefore limited, created, and expressed of the said testator's said manors and estates in Hickling, Stalham, Ingham, and Sutton, after and subsequent to the said term, with a limitation over to the next person in remainder, in case of refusal or neglect of any son to make such deeds within the aforesaid time.

*828] *The above-mentioned condition was performed by the defendant on the 16th of June, 1857, executing disentailing deeds of all the property then vested in him in tail, including the estates devised in 1797, and appointed in November, 1810, and settling such property as directed by the last-mentioned will of 1852.

Upon the death of the said Colonel Micklethwait, the defendant entered into possession of the said estates in the counties of Norfolk, Suffolk, and Essex, and in the city of Norwich, and in the county of Westmeath, in Ireland, devised by the testator of 1797, and the Hickling and other estates comprised in the settlements of 1804 and 1810, and in the deed of 1812, severally mentioned in the will of 1852, except the estates conveyed to Jonathan George Micklethwait as hereinbefore mentioned, and from thence hitherto has been and still is in possession of the same.

Neither the plaintiff nor the defendant has at any time taken or borne the surname or arms of Peckham jointly with those of Micklethwait; nor has either of them for that purpose solicited for or obtained any license by Royal sign-manual.

On the 27th of February, 1856, the defendant addressed the following letter to the plaintiff:—

"Hollingdon Court, Uxbridge,

"My dear Henry, "27th February, 1856.

"I am much surprised and annoyed at the letter I have received from you in answer to my note of Sunday night.

"All that I have desired to do, is, to place the real facts of the case before you, and to make you aware that I shall certainly take all that I am entitled to; and I shall never find fault with any one that may dispute my claim or establish any right for himself. Had I merely con-

*829] sulted my own peace and *comfort, I should have taken the opinion of an eminent lawyer upon the subject, and then have

kept my own counsel until the time came for establishing my claims: but this appeared to me a selfish and ungenerous course of proceeding between brothers; and therefore, as soon as I became fully aware of the contents of my father's will, I hastened to inform you of its probable bearings upon the old Iridge estate.

"Fred. has long been aware of the difficulties of the case; and so were Sir Peckham and my father. In fact, there was a correspondence about the possibility of resettling of the estates: and I have seen the opinion given by Mr. Christie in the year 1850 (I think) on the subject.

"You speak in your letter as if my claim to hold the old Iridge estate as tenant for life merely rested on 'an omission or inaccuracy' in the shifting clause of my great-uncle's will. Such, however, is not the case: and I will now give you an outline of the facts, more particularly, as I think you also labour under another error, viz., that the shifting clause was to prevent the union of my father's landed estates (held under his grandfather's and Mr. Branthwayt's wills) with the Iridge estate.

"On my father's marriage in 1804, John Micklethwait settled certain properties in Ireland, Suffolk, and Essex, on my father and his heir male. In the year 1822 he made his will, leaving the Iridge estate to Sir Peckham and his heirs, then to me and my heirs, &c. He then introduced a shifting clause, to the effect, that, if any of the sons of my father, after they came into possession of the Iridge estate, should become entitled to the property he had settled on my father's marriage, as his heir male, then the Iridge estate should pass to the next in the entail. The colonel, as my father's heir male, has come into possession of these *aforesaid settled estates, and, in compliance with my [*830
father's directions, has used his right to disentail these estates, and to resettle them according to my father's wishes; and by that settlement I shall doubtless become entitled to them as tenant for life, but as tenant for life only, without the option of disposing of them according to my own wishes; for, by the present will, any daughters I might have are excluded, and the preference given to my sisters. But, understand me, I am not complaining of this arrangement: I only allude to it, in order to show the true facts of the case.

"Since seeing Fred., I have had a very positive legal opinion, that, the Colonel having barred his entail, and resettled the estates, the shifting clause falls to the ground, from the fact, that, when an estate is resettled, it becomes another estate in the eye of the law: and though I might, through these means, become possessed of it, I could never hold it under the terms contemplated by my great-uncle's will. You see, therefore, first, that the disputed point involves a very small part of my father's estate, and, secondly, that my claim is founded upon no technical objections.

"If John Micklethwait had been in earnest in preventing the two estates from coming together, why did he limit the entail to you, and not continue it to Fred., who was born when he made his will?

"You have been most unlucky as to present means; and I wish it had been otherwise: but eventually you may be in the best position of any of the family; for, you may be entitled to the old Iridge estate in fee, and to the whole of my father's estates as tenant for life.

"As to your concluding remark, that my father died in the 'full confidence' that the two estates would be kept separate by his 'successors,'

I do not hesitate to say that there is not the slightest foundation for
*831] such a belief: and, when I discussed the subject with Fred., *he never even attempted to bring forward such an argument. I firmly believe that my father was perfectly well acquainted with all the circumstances of the case; and, had he wished that the estates should have been kept separate, he had ample means of enforcing compliance.

"What Fred.'s motives could have been for giving you the assurance you told me he had often done, that the two estates could not go together, I cannot imagine, as I can produce a letter written by him six years ago, in which he states, that, under certain circumstances, I must become entitled to the two properties, or words to that effect. I shall be in London to-morrow, &c.

"Do not let yourself be drawn into making these unguarded assertions. You may some day be placed in the same situation in which I now am; and be sure that they will then be remembered and brought forward against you.

"Believe me your affectionate brother,

"JOHN MICKLETHWAIT."

The plaintiff, on the 19th of September, 1856, demanded of the defendant possession of the property mentioned in the writ in this action; to which demand the defendant refused to accede.

The accompanying pedigree is a correct pedigree of the Micklethwait family, and is to be taken as part of the case. [See next page.]

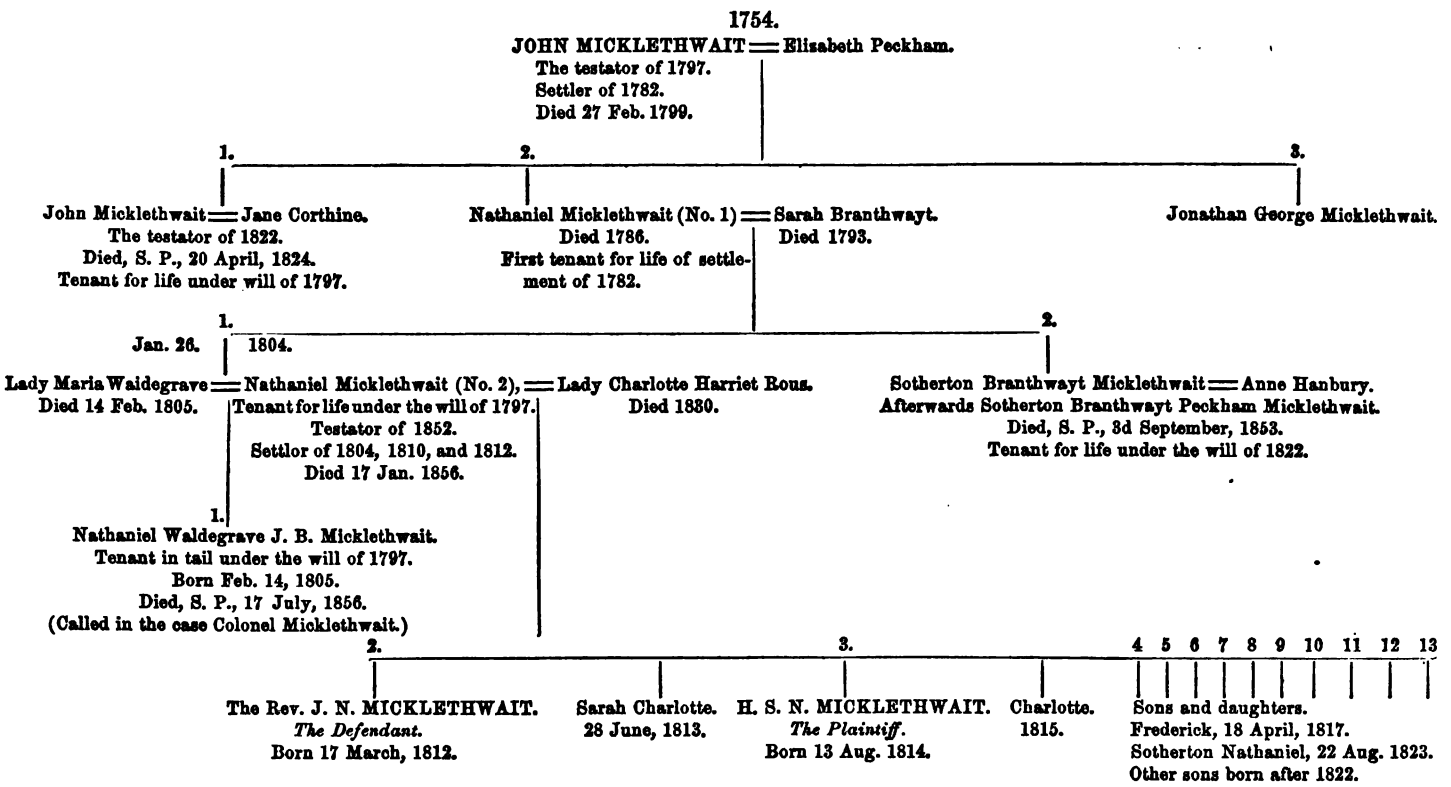
Each of the deeds and wills above mentioned is to be taken as set out in full, and copies are to be referred to if necessary.

The court are to be at liberty to draw any inferences of fact from the facts hereinbefore stated which a jury might draw.

The defendant objects to the admissibility in evidence of the beforementioned alleged draft and instructions for the will of 1822; and the plaintiff objects to the admissibility of the will of 1852.

*833] *The question for the opinion of the court,—subject to the above objections, is,—whether, under the circumstances hereinbefore stated, the plaintiff is entitled to the property mentioned in the said writ of ejectment. If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiff, with costs of suit. If the court shall be of opinion in the negative, then judgment of nol pros., with costs of defence, shall be entered up for the defendant.

Atherton, Q. C. (with whom was *R. Clarke* and *Honyman*), for the plaintiff.—The defendant, the second son of Nathaniel Micklethwait, the nephew of John Micklethwait the testator of 1822, having by reason of the death of Colonel Micklethwait, his elder brother, without issue, in 1856, succeeded as heir male of the body of his father, within the meaning of the language of the second shifting clause in the will of 1822, to the property settled on the marriage of Nathaniel Micklethwait his father (viz., the Hickling estates), ceased to be entitled to retain the Iridge estate, which had come to him upon the death of his uncle Sotherton Branthwayt Micklethwait (or, as he was afterwards called, Sir Peckham Micklethwait) in 1853,—the property thereby meant to be designated being the estates which passed by the will of 1797 and the appointment of John Micklethwait of 1810 made with a view to and as a settlement upon the second marriage of his nephew Nathaniel Micklethwait.


1754.
JOHN MICKLETHWAIT = Elisabeth Peckham.
The testator of 1797.
Settler of 1782.
Died 27 Feb. 1799.
1.
2.
3.
John Micklethwait = Jane Corthine.
The testator of 1822.
Died, S. P., 20 April, 1824.
Tenant for life under will of 1797.
Nathaniel Micklethwait (No. 1) = Sarah Branthwayt.
Died 1786.
First tenant for life of settlement of 1782.
Died 1793.
Jonathan George Micklethwait.
1.
2.
Jan. 26. 1804.
Lady Maria Waldegrave = Nathaniel Micklethwait (No. 2), = Lady Charlotte Harriet Rous.
Died 14 Feb. 1805.
Tenant for life under the will of 1797.
Testator of 1852.
Settlor of 1804, 1810, and 1812.
Died 17 Jan. 1856.
Died 1830.
Sotherton Branthwayt Micklethwait = Anne Hanbury.
Afterwards Sotherton Branthwayt Peckham Micklethwait.
Died, S. P., 3d September, 1853.
Tenant for life under the will of 1822.
1.
Nathaniel Waldegrave J. B. Micklethwait.
Tenant in tail under the will of 1797.
Born Feb. 14, 1805.
Died, S. P., 17 July, 1856.
(Called in the case Colonel Micklethwait.)
2.
3.
4 5 6 7 8 9 10 11 12 13
The Rev. J. N. MICKLETHWAIT.
The Defendant.
Born 17 March, 1812.
Sarah Charlotte.
28 June, 1813.
H. S. N. MICKLETHWAIT.
The Plaintiff.
Born 13 Aug. 1814.
Charlotte.
1815.
Sons and daughters.
Frederick, 18 April, 1817.
Sotherton Nathaniel, 22 Aug. 1823.
Other sons born after 1822.

The object of the testator evidently was, to prevent the union of the two estates,—the Iridge estate, and the estates which passed by the will of 1797 and the appointment of 1810,—in the same person. Over the former, he had an absolute power of disposition; as to the latter, he had a mere power of appointing in favour of one or other of his two nephews,
*834] the grandsons of the testator of 1797. Conditionally *upon the confirmation of the imperfect codicil in the will of 1797, and upon failure of issue of Sir Peckham Micklethwait, the Iridge estate is devised to John Nathaniel Micklethwait, the defendant, for life, and to his sons successively in tail male. Upon the death, therefore, of Sir Peckham Micklethwait without issue in 1853, the defendant acquired an indisputable title to the Iridge estate: and, upon the death of Colonel Micklethwait without issue in 1856, he succeeded under the limitations in the will of 1797 and the appointment of 1810 to the estates comprised in the settlement of the latter date. The question then is, whether the effect of the shifting clause in the will of 1822 was not to dispossess the defendant of his title to the Iridge estate. That clause is as follows: "And as by possibility it may so happen, that, from and after the second, third, fourth, or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of his or their respective body or bodies, shall, under the limitations aforesaid, have come into possession of my said hereditaments and real estate, the eldest or elder son of my said nephew Nathaniel Micklethwait, or the heirs male of his body, may die and become extinct, so that the second or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of the body of such second or other younger son may become entitled to the property settled on the marriage of the said Nathaniel Micklethwait, in the character of the then heir male of his body: now, in order to prevent the union of the two estates in the same person whilst there is in existence a younger son or an heir male of the body of a younger son of my said nephew Nathaniel Micklethwait, I do by this my will direct and declare, that, in case the second, third, fourth, or other younger son, or the heirs male of the body of such younger son or sons, shall by the death or failure
*835] *of issue male of the eldest or other eldest son become entitled to the said settled property of my said nephew Nathaniel Micklethwait, *as the heir male of his body*, then the limitations in this my will in favour of such second or other younger son so becoming entitled shall immediately after such event cease and become void, and the next younger son of my said nephew Nathaniel Micklethwait and the heirs male of his body shall under the limitations of this my will become entitled to my hereditaments and real estate aforesaid, in such manner in every respect as if his next elder brother, or the issue male of his body, had been dead or become extinct." The manifest intention of the testator by that clause was, to prevent the Iridge estate, over which he had an absolute right of disposal, from being possessed by the same person who should become, in the way pointed out (not perhaps with strict accuracy), entitled to the property comprised in the will of 1797 and the settlement of 1810; and this the defendant clearly took in the character of the then heir male of the body of his father,—an expression which is evidently (as appears from similar inaccuracies of expression in other parts of the will) used by the testator in the popular rather than in the strict legal sense of those words. The statement of facts at pp.

822—824, in the view above presented, clearly would not be admissible; there being no ambiguity which needs the aid of extrinsic evidence to explain it.

Lush, Q. C. (with whom was *R. E. Turner*), for the defendant.—Three propositions will be submitted for the consideration of the court,—first, that the property referred to in the second shifting clause as "settled on the marriage of Nathaniel Micklethwait," is not the property comprised in the will of 1797, and dealt with on the marriage of Nathaniel Micklethwait in 1810, but the *Hickling, Beeston, and Tunstall estates dealt within the settlement made on the marriage [*836 of 1804; and that, consequently, the contingency provided for in the shifting clause, of the second nephew succeeding in place of the first, as "heir male of the body" of his father, has not happened, inasmuch as the defendant has succeeded to these estates, not as "heir of the body," but as devisee under the will of his father,—secondly, that, even assuming that the estates referred to in the shifting clause are the estates devised by the will of 1797, still the contingency provided against has not happened, inasmuch as the defendant has not succeeded to these estates as "heir male of the body" of his father Nathaniel; because, taking as first tenant-in-tail after the determination of the estate for life, according to the limitations of the will of 1797, he would take, not an estate by inheritance, but an estate-tail as purchaser,—thirdly, that, even if this should be held otherwise, still the contingency provided for by the will has not been fulfilled in regard to the estates succeeded to, seeing that the estates settled (according to the plaintiff's own construction) on the marriage of 1810, comprised *the whole* of the estates devised by the will of 1797, while the defendant has succeeded only to a part of those estates, other part having been conveyed to Jonathan George Micklethwait conformably to the will of 1822, as the price of the defendant's acquisition of the Iridge estate. It is admitted, on the part of the plaintiff, that the defendant's title to the property in question under the will of 1822 is primâ facie indisputable. Now, it is a well-established rule of law that a right clearly vested is not to be divested except by language equally plain and unambiguous. Thus, in Fazakerley *v.* Ford, 4 Simons 390, W. G., by his will, dated in 1775, devised his estates to his nephew for life, with remainders to his first and other sons in tail *male. T. G., the nephew's eldest son, after his father's [*837 death, suffered a recovery, and limited the estates to himself for life, remainder, subject to a term for securing a jointure and raising portions for his younger children, to his first and other sons in tail male. S. F., by his will, dated in 1804, devised his estates to trustees, in trust for the second and subsequently born sons of T. G., in tail male: provided, that, if the lands devised by W. G. to T. G. in tail male should descend to or devolve upon any son of T. G., or any heir male of such son, and the person on whom those lands should descend or devolve, should, under the trusts of his (S. F.'s) will, be tenant in tail male of his estates, so as to be then actually in the possession or receipt of the rents and profits thereof, then his estates should be in trust for the person who would be entitled to his estates under his will, if the person on whom W. G.'s estates had so descended or devolved were dead without issue. T. G. had three sons: the eldest died in his lifetime: then T. G. died: and it was held by Vice-Chancellor Shadwell, that, as W. G.'s

estates came to T. G.'s second son encumbered with the term, S. F.'s estates did not go over under the shifting clause. In giving judgment the Vice-Chancellor says: "I am extremely unwilling at any time to make the decision of an important question depend upon the nice and accurate construction of any particular word; but I would rather construe the will by a fair and general interpretation of the words, having regard to what is shown, upon the face of the will, to be the obvious intention of the testator." Upon appeal to the Lord Chancellor, a case was sent for the opinion of the Court of Queen's Bench, and after argument the majority of that court,—Lord Denman, C. J., Parke, J., and Patteson, J. (dissentiente Taunton, J.),—certified in conformity with the opinion of the Vice-Chancellor: see 1 Ad. & E. 897 (E. C. L. R. vol. 28), *2 N. & M. 1 (E. C. L. R. vol. 28). In Thornhill v. Hall, 2 Clark & F. 22, it is laid down as a rule of the courts in construing written instruments, that, when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate. In that case, the testator recited seriatim in his will the interests he had in several leaseholds for lives, and after each recital he devised the rents and profits of each leasehold to his wife and a married daughter, and to each of his sons and unmarried daughters, severally and respectively, devising to his son R. part of the profit rent of Blackacre during the term of the lease, which was for the lives of the testator and of R. and another, and devising to his unmarried daughters nominatim different parts of the rents of Whiteacre, in addition to equal shares given to them by the preceding clause in the rents of another estate; "and, further, if any of the above legatees should die, or die unmarried, he left the property bequeathed to them to be divided equally among the survivors of them:" and it was held, that the devise to R. in Blackacre was for the whole term of the lives of the cestuis que vies, and was not, on R.'s dying unmarried, cut down to an estate for life only, by the clause of survivorship, but that the words of the clause applied to the last-mentioned unmarried daughters only. In giving his judgment, the Lord Chancellor (Lord Brougham) says: "I hold it to be a rule that admits of no exception, in the construction of written instruments, that, where one interest is given, where one estate is conveyed, where one benefit is bestowed in one part of an instrument, by terms

*838]

*clear, unambiguous, liable to no doubt, clouded by no obscurity,

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by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt,—in order to reverse that opinion, to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should show a possibility; it is not even sufficient that you should deal in probabilities; but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by tacitum or by dubium, or by possibile, or even by probabile, but that it must be taken away, and can only be taken away, by ex-

pressum et certum." Here, then, is a clear and unambiguous limitation of the Iridge estate in favour of the defendant. Before they can give effect to the argument on the other side, the court must be satisfied that there is an equally clear intimation of intention on the part of the testator, that, in the event which has happened, the estate was to go over. It is submitted that the language of the shifting clause is not more applicable to the estates which passed by the will of 1797, than to the estates which formed the subject of the settlement in 1804. In truth, it is not applicable to either; but to the Hickling, Beeston, and Tunstall estates, as limited by the original settlement of the testator's father, in 1782. [COCKBURN, C. J.—The Tunstall estate was gone at this time: it had been sold in 1809.] It does not appear from the case that that fact was known to the testator of 1822. [COCKBURN, C. J.—It can hardly, I think, be presumed that he did not know the condition of the property in 1810, when he took so active a part in the proposals for the settlement of that date.] It is *clear, that, if the recovery [*840 contemplated by the first settlement had never been suffered, the defendant would have been taken in the precise character of "heir male of the body of his father" indicated by the shifting clause. The deed executed upon Nathaniel's marriage in 1804, though not strictly speaking a settlement, was one which a court of equity would have so treated; and therefore the testator might well speak of the property therein mentioned as settled property. But, whether the estates referred to in the shifting clause are the estates devised by the will of 1797, or those dealt with in the so-called settlement of 1804, the event contemplated has not happened. [COCKBURN, C. J.—Now arises the question as to the admissibility of the parol evidence.] The argument on the part of the plaintiff is, that, looking at the whole of the will together, the shifting clause refers to the property devised by the will of 1797: on the other hand, the defendant submits that it is more strictly applicable to the settlement of 1804. [COCKBURN, C. J.—I think it is impossible to adopt either view, without looking at the surrounding circumstances.] The case, it is submitted, is not within the rule which warrants the reception of parol evidence to explain the intention of the testator. Assuming parol evidence to be admissible, the papers in question are not legitimate evidence: there was nothing to identify the first document as the testator's instructions for his will; it may have been a mere abstract compiled from the draft. [COCKBURN, C. J.—The language used is rather indicative of its being instructions, than of its being an abstract.] The fact that the document accords with the provisions in the will does not make it admissible, or justify its reception for the purpose of explaining the will. The only ground upon which it could be received is, that it is *proved* to be a document which contains the testator's *instructions for drawing his will. What proof is there [*841 of that, except the bare fact that the document is found in the office of the deceased solicitor? [COCKBURN, C. J.—Tied up with that which indisputably is the genuine draft of the will.] That carries the case no further. Neither does the statement of the clerk; for, his belief that the pencil marks were made by him is founded upon the assumption that the document was what it purports to be, in which case only would it have been his duty to have made them. [BYLES, J.—Part of the draft will is in the handwriting of that clerk.] But it is

submitted that this is not a case in which such evidence is admissible at all. In Doe d. Hiscocks *v.* Hiscocks, 5 M. & W. 363,† a testator devised lands to his son John H. for life, and, from and after his decease, to his (the testator's) grandson John H., *eldest son* of the said John H., for life, and, on his decease, to the first son of the body of his said grandson John H. in tail male, with other remainders over. At the time of making the will, the testator's son John H. had been twice married: by his first wife he had one son, *Simon*, by his second wife an eldest son, *John*, and other younger children, sons and daughters: and it was held, that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to show which of these two grandsons was intended. Lord Abinger, in giving the judgment of the court, after referring to a great number of authorities, concludes thus,—"Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is, to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were res integra, we should be much disposed to hold the devise void for uncertainty; but
*842] *the cases of Doe d. Le Chevalier *v.* Huthwaite, 3 B. & Ald. 632 (E. C. L. R. vol. 5), Bradshaw *v.* Bradshaw, 2 Y. & Coll. 72,† and others, are authorities against this concluison. If, therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly: but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will." Applying the principle of that case here, it is clear that parol evidence ought not to be received for the purpose of showing which estates the testator indicated by the expressions used in the shifting clause. [COCKBURN, C. J.—The testator's declarations would be admissible to explain that which upon the face of the will appears to be ambiguous.] No doubt. [COCKBURN, C. J.—But for the settlement of 1804, the language of the shifting clause would have been satisfied by the settlement of 1810. If so, there is an ambiguity, which justifies the admission of parol evidence.] It is submitted that the language cannot refer to the estates settled by the will of 1797. [WILLIAMS, J.—Your objection is, that neither property precisely answers the description in the shifting clause. Is not that the case which is alluded to in Doe d. Hiscocks *v.* Hiscocks? I find it further alluded to in a case of Douglas *v.* Fellows, Kay 114. There, a will contained a legacy to Commodore P. D., of S., and a like legacy to the children of P. H. D. This last legacy was claimed by the three children of H. O. D., and also adversely by the five children of P. D., whose real name was P. J. D. P. J. D. and H. O. D. were both in the same degree of relationship to the testatrix, and she had given like legacies to their brothers and sisters. H. O. D. was dead at the date of the will. It was
*843] held, *that the previous gift to Commodore P. D., and the fact that the gift was not to the children of "the said" P. H. D., together with the intention manifested in the will to provide for all the members of the D. family, was sufficient to enable the court to decide, upon the face of the will, that the children of H. O. D. were intended, although

there was no reference to him as "the late" H. O. D.; and that extrinsic evidence of the intention of the testatrix was not admissible; although it might have been if there had been only one class of claimants. Vice-Chancellor Page Wood there says: "I think, that, without admitting the evidence of intention in this case, I must decide against Mr. Wigram's clients: (*a*) but I should be most reluctant to have it supposed that I should be inclined to admit this evidence. I think that the only case in which it would be admissible might, perhaps, be that imaginable case which was hinted at in Doe d. Hiscocks *v.* Hiscocks, 5 M. & W. 373,† where the description used being incorrect and equally inapplicable to two persons, an equivocation arises. If that be law in any sense, it must mean, that, where all the legitimate evidence has been admitted, and two classes of persons, improperly designated, seem to be equally pointed at by the words of the will, an equivocation then arises; just as in the case where there are two manors of the name of Dale, either of which might have been designated by the words of the will." (*b*) Suppose a man were to leave a legacy to his nephew James, and it turned out that he had no nephew James, but that he had two great-nephews called James,—would parol evidence of the testator's declarations be admissible to show which *of his two great- [*844
nephews he meant?] It is submitted that it would not. Suppose the testator had also a first cousin James? [COCKBURN, C. J.—He would not be very likely to mistake his first cousin for his nephew; but he might very well mistake his nephew for his great-nephew. WILLIAMS, J.—The case of Doe d. Allen *v.* Allen, 12 Ad. & E. 451 (E. C. L. R. vol. 40), 4 P. & D. 220, seems nearer to this than Doe d. Hiscocks *v.* Hiscocks. There, the testator devised estates to John A., the grandson of T. A., charged with the payment of 100*l.* "to *each and every* the brothers and sisters of the aforesaid John." At the time of making the will, there were two persons named John A., grandsons of T. A., one of whom had several brothers and several sisters; the other had only one brother and one sister: and it was held that parol evidence of declarations of the devisor that she had left her property to the grandson who had only one brother and one sister, were admissible to show which grandson should take under the devise; and that it was no objection to such evidence that the declarations were subsequent to the making of the will. The court do not seem to approve of Doe d. Hiscocks *v.* Hiscocks: but they say that the case in hand "is directly within the authority of Cheyney's Case, 5 Co. Rep. 68 a, and of the recent case of Doe d. Gord *v.* Needs, 2 M. & W. 129;"† and that "it is also within the very terms of the only case in which, according to the opinion of the Court of Exchequer thrown out in their judgment in Doe d. Hiscocks *v.* Hiscocks, declarations of the testator can be received as evidence of his intention."] Unless the description is equally applicable to both subjects, parol evidence is clearly inadmissible to explain which property the testator referred to. But, whether the shifting clause in question refers to the estates settled in 1782, or to those limited by the will of 1797, in neither case has the event happened upon which the

(*a*) The children of Commodore D.

(*b*) See Blundell *v.* Gladstone, 11 Simons 467, 1 Phill. 279, Doe d. Gains *v.* Rouse, 5 C. B. 422 (E. C. L. R. vol. 57).

*845] *shifting clause was to take effect. The testator clearly contemplated that the estate, whichever it was, should be an estate of inheritance. Now, the Hickling, Beeston, and Tunstall estates have not come to the defendant either as an estate in fee or in tail; therefore the testator could not have meant to refer to them. Then, assuming the estates limited by the will of 1797 to have been contemplated, the event which was to deprive the defendant of the Iridge estate has not happened, viz. that of the *whole* of those estates, not a *part* of them, coming to the defendant or his issue under the limitations of the will. [COCKBURN, C. J.—The object of that was, to provide for the case of Nathaniel Micklethwait not conveying the Sussex estates to the Sotherton branch.] That can hardly be so; for the estate is given, first, to the nephew Sotherton and his issue, secondly, to the testator's brother Jonathan George and his issue, thirdly, to Nathaniel and his issue. [COCKBURN, C. J.—If it is capable of another meaning, then surely you are not at liberty to insert the word "all," unless the whole scheme of the will must otherwise fail.] The construction contended for is the natural construction of the language used by the testator. The "property settled" could only have reference to the property proposed to be settled by the deed of 1804, which recites the settlement of 1782, and which was the only deed in the nature of a settlement to which the testator was a party. [COCKBURN, C. J.—As at present advised, I entertain no doubt that the testator, when he speaks of property settled upon the marriage of Nathaniel, looking at what took place in 1804 and 1810, and seeing that he must have had present to his mind the "proposals for a settlement," which he signed, and which he carried out by giving effect to the provision of the will of 1797 by means of the appointment

*846] which he afterwards executed, he must have been *speaking of the property which popularly speaking was "settled" in 1810. That being so, my learned Brothers agree with me that there is no ambiguity, and therefore recourse need not be had to the parol evidence.]

Atherton, Q. C., in reply.—The event has happened upon which the Iridge estate was to be divested, under the shifting clause, in favour of the third son of the testator's nephew, the plaintiff in this action,—the defendant, the second son, having become entitled to the property settled on the marriage of Nathaniel Micklethwait, though not strictly and technically by inheritance. [COCKBURN, C. J.—I think you need not labour that. It comes at last to the point which was last urged by Mr. *Lush*, viz., whether, in order to satisfy the terms of the shifting clause, it was not necessary that the defendant should have succeeded to the *whole* of the property comprised in the will of 1797.] The argument on the part of the defendant would wholly frustrate the obvious intention of the testator.

COCKBURN, C. J.—The latter part of the argument presented on the part of the defendant alone creates any serious difficulty. Upon that we desire to take time to deliberate. Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court:—

The question in this case turns on the construction and effect of a clause in the will of John Micklethwait, of the 24th of October, 1822. To the due appreciation of the question, it is expedient to set forth the state of the family and the antecedent disposition of the family estates.

John Micklethwait, the testator's father, had three *sons,— [*847
John, the eldest, upon whose will the present suit arises, Nathaniel, and Jonathan George.

John Micklethwait, the father, was possessed of estates held in fee simple in various counties. He possessed estates called the Hickling, Beeston, and Tunstall estates, in the county of Norfolk, and also other estates in the counties of Norfolk, Suffolk, Surrey, and Middlesex, and in the city of London, and in the county of Westmeath, in Ireland. On the marriage of his second son, Nathaniel, with Susan Branthwayt, the said John Micklethwait, by indenture of settlement, bearing date the 11th of September, 1782, settled the Hickling, Beeston, and Tunstall estates, after a prior estate for life to himself and a provision as to pin-money for the intended wife, to the use of his son Nathaniel, for life, remainder to such son of the marriage as Nathaniel should appoint, and, in default of appointment, to the use of the first and other sons of the marriage, in tail male, with remainder to the settlor, in fee.

There was issue of this marriage, Nathaniel, called in the case Nathaniel Micklethwait (No. 2), and Sotherton Branthwayt, afterwards known as Sir Peckham Micklethwait. The father, the first Nathaniel, died in 1796, in the lifetime of his father.

The Hickling, Beeston, and Tunstall estates having been thus settled on the marriage of the first Nathaniel, John Micklethwait, the father, proceeded, by his will of the 4th of December, 1797, to devise his other real estates as follows,—first, to the use of his eldest son, John Micklethwait (the testator of 1822), for life, with remainder to the use of his first and other sons successively in tail male; and, in default of such issue, to the use of such one of his two grandsons, Nathaniel and Sotherton Branthwayt, sons of his late son Nathaniel, as his son John should by deed or will appoint, for life; *remainder to the first [*848
and other sons of such appointee, successively, in tail male; remainder, in default of issue, to the other of his two grandsons, for life; remainder to the first and other sons of such grandson, successively, in tail male. In case of default of any such appointment by John, the testator devised the estates to the eldest of his two grandsons, Nathaniel, for life, with remainder to his first and other sons successively in tail male; with remainder, on failure of such issue, to his second grandson, Sotherton Branthwayt, for life, and to his sons successively in tail male; and, on failure of such issue, to his (the testator's) third son, Jonathan George, for life, and to his sons successively in tail male; remainder to the testator's own right heirs.

By a codicil, of the 26th of February, 1799, the testator professed to revoke the foregoing devise, so far as regarded the estates in Surrey, Middlesex, and London, and to devise these to his son Jonathan George, in fee; but this codicil, not having been duly attested so as to pass real estate, did not take effect.

On the death of John Micklethwait, the testator of 1797, John Micklethwait, the testator of 1822, entered into possession of the estates comprised in the will of 1797, and continued in possession till his death, in 1824.

Nathaniel (No. 2), the eldest son of the first Nathaniel, and the eldest grandson referred to by the testator of 1797, succeeded to the Hickling, Beeston, and Tunstall properties, as first tenant in tail, his father having

made no appointment of the estate conformably to the power contained in the settlement of 1782. In 1804, this Nathaniel (No. 2), being about to marry Lady Maria Wilhelmina Waldegrave, executed an instrument, which is called a settlement, and which bears date the 18th of January, 1804.

*849] By this settlement, made between Nathaniel *Micklethwait, of the first part, John Micklethwait (the testator of 1822) and Miles Sotherton Branthwayt, described as the guardians of the said Nathaniel Micklethwait, of the second part, and various persons therein named as the guardians of Lady Maria, of the third part,—after reciting the settlement of 1782, Nathaniel Micklethwait covenants, with the consent of his guardians, within three months after he shall have attained the age of twenty-one, to settle and assure the Hickling, Beeston, and Tunstall estates to the use of himself for life, and, after his decease, to the use and intent that Lady Maria should during her life receive a jointure-annuity of 1000*l.*, with the usual powers of entry and distress, and a term of years for securing the same; and, subject thereto, to the use of himself in fee. In fulfilment of this agreement, Nathaniel Micklethwait, by an indenture of the 28th of January, 1805, and a recovery suffered in pursuance thereof, barred the entail in these estates. It does not appear that any deed was ever executed charging these estates with the jointure-annuity to Lady Maria. The arrangement became abortive and fell to the ground, in consequence of the death of Lady Maria, who died on the 14th of February, 1805, immediately after giving birth to a son (the only child of the marriage), who was named Nathaniel Waldegrave John Branthwayt, and who in the case is more generally designated as Colonel Micklethwait. The estates referred to in the so-called settlement of 1804, having been thus disentailed, one of them, the Tunstall estate, was afterwards, in 1809, sold by Nathaniel Micklethwait.

In October, 1810, a marriage being contemplated between Nathaniel Micklethwait, now a widower, and Charlotte the daughter of Lord Rous, proposals for a settlement, to which John Micklethwait, the testator of

*850] 1822, was a party, were drawn up and agreed to. *In these it was proposed by Nathaniel Micklethwait to charge the Hickling estate with an annuity of 1000*l.* per annum in favour of his intended wife, in the event of her surviving him, and with a further annuity of 500*l.* a year, if his uncle John Micklethwait should exercise the power of appointment given him by the will of 1797, in his, Nathaniel Micklethwait's, favour. Nathaniel Micklethwait further proposed to charge the Hickling estate with 25,000*l.* for the fortunes of the children of the intended marriage; and the settlement was to contain all usual powers and provisions for raising and securing the payment of the annuities and the children's fortunes, and all other powers necessary for carrying the trusts of the settlement into effect.

Then follows a proposal by John Micklethwait, the testator of 1822, in the following terms,—"Mr. Micklethwait proposes, in pursuance of the power given to him by his father's will, immediately to appoint all the estates thereby devised to him, to Mr. Nathaniel Micklethwait." By a subsequent clause, the sum to be charged on the Hickling estate for the children's fortunes, was to be 10,000*l.*, instead of 25,000*l.*;

another 10,000*l.* and 5000*l.*, the intended wife's portion, being to be invested in a certain specified manner.

These proposals having been adopted as the basis of the settlement, Mr. John Micklethwait executed a deed of appointment of the 29th of November, 1810, whereby he appointed the estates devised by the will of 1797, to Nathaniel, the eldest of the two grandsons, to hold according to the terms of the will of 1797. A marriage-settlement was thereupon executed by Nathaniel Micklethwait of the first part, Lord Rous of the second part, the intended wife of the third part, and trustees of the fourth part. By this settlement, Nathaniel Micklethwait conveyed the Hickling estate to the trustees of the settlement, to the use of *himself for life, remainder to the intent that his intended wife, [*851 in case she should survive him, should receive thereout a jointure-annuity of 1000*l.*; and, subject thereto, to the use of the trustees for a term of one thousand years for securing the annuity, and for raising 15,000*l.* for the portions of the younger children; and, subject thereto, to the use of himself in fee. He further covenanted with the trustees, as soon as he should come into possession of the other estates by virtue of the will of 1797 and his uncle's appointment, to charge those estates with a further annuity of 500*l.* in favour of his intended wife, and, so far as he was able, he thereby limited and appointed to her the said annuity, to be payable out of the said estate.

There were several children of this marriage. The eldest son, John Nathaniel, is the defendant in this action: the second son, Henry Sharnborne Nathaniel, is the plaintiff.

Such being the state of the family and of the family estates, in the year 1822 John Micklethwait, the tenant for life under the will of 1797, being at that time, as he continued to be till his death, childless, proceeded to make his will. He had become possessed, through the family of his mother, a Miss Peckham, of real estates in fee-simple in the counties of Kent and Sussex. It is with reference to the estate in Sussex, known by the name of the Iridge estate, that the present question arises; and it will only be necessary to advert to so much of the will as relates to it.

After reciting his father's will and attempted codicil, and that the latter became ineffective by reason of the attestation thereto being defective, and that it was his (the testator's) wish that his father's codicil should be confirmed, and that the devise therein of the lands in Surrey, Middlesex, and London, to his brother Jonathan George in fee should be fully and legally established, *he proceeds to devise the Iridge [*852 estate to trustees,—first, to the use of his nephew Sotherton Branthwayt Micklethwayt for life, remainder to the first and other sons of the body of Sotherton Branthwayt Micklethwait successively in tail male,—secondly, in default of such issue, to his brother Jonathan George, for life, remainder to his nephew John, eldest son of his brother Jonathan George, for life, and to the first and other sons of the said John Micklethwait, successively, in tail male. Then follow two shifting clauses. The first provides, that, if the testator's nephew Nathaniel and his first or other son or sons, or his or their heirs, should, in the lifetime of Jonathan George Micklethwait, effectually confirm and establish the codicil of 1797, by effectually conveying the lands, &c., in Surrey, Middlesex, and London, to Jonathan George, in fee, then the foregoing

devise in favour of Jonathan George, and of his son John and his first and other sons in tail male, was to become void; and, immediately on such event, or otherwise in default of issue of the testator's nephew John Micklethwait, the estate was to pass to the testator's great-nephew John Nathaniel Micklethwait (second son of his nephew Nathaniel), for life, remainder to the first and other sons of the body of John Nathaniel, in tail male, remainder to the third, fourth, fifth, and every other son of the testator's nephew Nathaniel (excepting always the eldest son), successively, in tail male, with remainder, in default of issue, to Jonathan George, in fee. Then follows the shifting clause upon which the present contest arises, and which is in these words:—"And as by possibility it may so happen, that, from and after the second, third, fourth, or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of his or their respective body or bodies, shall, under the limita-
*853] tions aforesaid, have come into possession of my *said heredita-ments and real estate, the eldest or elder son of my said nephew Nathaniel Micklethwait, or the heirs male of his body, may die and become extinct, so that the second or other younger son of my said nephew Nathaniel Micklethwait, or the heirs male of the body of such second or other younger son, may become entitled to *the property settled on the marriage of the said Nathaniel Micklethwait, in the character of the then heir male of his body:* Now, in order to prevent the union of the two estates in the same person whilst there is in existence a younger son, or an heir male of the body of a younger son, of my said nephew Nathaniel Micklethwait, I do by this my will direct and declare, that, in case the second, third, fourth, or other younger son, or the heirs male of the body of such younger son or sons, shall, by the death or failure of issue male of the eldest or other elder son, become entitled to the said settled property of my said nephew Nathaniel Micklethwait, as the heir male of his body, then the limitations in this my will in favour of such second or other younger son, so becoming entitled, shall immediately after such event cease and become void, and the next younger son of my said nephew Nathaniel Micklethwait, and the heirs male of his body, shall, under the limitations of this my will, become entitled to my hereditaments and real estate aforesaid, in such manner in every respect as if his next elder brother, or the issue male of his body, had been dead or become extinct."

John Micklethwait, the testator, died in 1824. On his death, his nephew Sotherton Branthwayt Micklethwait, who was created a baronet, and known as Sir Peckham Micklethwait, entered into possession of the Iridge estate under the foregoing will. Nathaniel Micklethwait entered into possession of the estates devised by the will of 1797.

*854] In April, 1826, Nathaniel Micklethwait and his *eldest son, Colonel Micklethwait, conveyed the property in Surrey, Middlesex, and London, to Jonathan George Micklethwait, in fee, conformably to the terms of the first shifting clause of the will of 1822; whereupon, by virtue of the provisions of the will, the devise of the Iridge estate in remainder to Jonathan George and his sons in tail male became void, and the devise of that estate in remainder to Nathaniel Micklethwait and his sons took effect.

On the death of Sir Peckham Micklethwait without issue, in September, 1853, the defendant, John Nathaniel Micklethwait, entered into

possession of the Iridge estate, under the will of 1822, and has since continued in possession. Nathaniel Micklethwait, his father, died on the 6th of January, 1856.

By his will, made in 1852,—after devising his Hickling and other estates, held in fee simple, to trustees for a term of years for raising a sum of money,—he devised the same, subject to such term, to his eldest son, Colonel Micklethwait, for life, with remainder to his sons successively in tail male; with remainder, on failure of such issue, to his second son (the defendant), for life; with remainder to his sons successively in tail male; with a like remainder to his third son, Henry (the plaintiff in this action); with remainders over. And, after reciting that he was seised for life, not only of real estates comprised in the indentures of the 22d and 23d of May, 1812 (which are set forth in the case, but have nothing to do with the present question, and therefore need not be further referred to), but also of other considerable real estates in England and Ireland, with remainder to his sons successively in tail male,—he declared that the devises in his will in favour of his sons were made on the condition that each and every of them who should become seised of the estates of which he (the testator) was seised for life, should *within twelve calendar months disentail the same and [*855
settle them to the uses to which his estates of Hickling, Beeston, and Tunstall stood limited by his will, with a limitation over to the person next in remainder, in case of refusal or neglect.

This condition the defendant fulfilled, by executing in June, 1857, disentailing deeds of all the property vested in him in tail, including the estates devised by the will of 1797, and appointed in 1810, and by settling such property as directed by the will of 1852.

In the mean time, Colonel Micklethwait, the eldest son of Nathaniel Micklethwait (No. 2), the testator of 1852, had died, namely, in July, 1856. The defendant thereupon entered into possession of the Hickling and Beeston estates, and of the property devised by the will of 1797, with the exception of the property in Surrey, Middlesex, and London, which, as we have seen, had been conveyed to Jonathan George Micklethwait in 1826.

Upon this state of facts, the plaintiff contends that the second shifting clause in the will of 1822 has taken effect, inasmuch as, by the death of the eldest son of Nathaniel Micklethwait (No. 2) without issue, the defendant, the second son, has succeeded, as heir male of the body of his father (within the meaning of the language of the clause), to "the property settled on the marriage of Nathaniel Micklethwait" (No. 2), such property being, as the plaintiff maintains, the estates which passed by the will of 1797, and the appointment of John Micklethwait of 1810, made with a view to, and as a settlement upon, the second marriage of Nathaniel Micklethwait (No. 2).

The defendant, on the other hand, makes three points,—first, that the property referred to in the second shifting clause as "settled on the marriage of Nathaniel Micklethwait," is, not the estates comprised in *the will of 1797, and dealt with on the marriage in 1810, but [*856
the Hickling, Beeston, and Tunstall estates, dealt with in the settlement made on the marriage of 1804; and that, consequently, the contingency provided for in the shifting clause, of the second nephew succeeding in place of the first, as "heir male of the body" of his father,

has not happened, inasmuch as the defendant has succeeded to these estates, not as "heir of the body," but as devisee under the will of his father;—secondly, that, even assuming that the estates referred to in the shifting clause are the estates devised by the will of 1797, still the contingency provided against has not happened, inasmuch as the defendant has not succeeded to these estates as "heir male of the body" of his father Nathaniel; because, taking as first tenant in tail after the determination of the estate for life, according to the limitations of the will of 1797, he would take, not an estate by inheritance, but an estate-tail as purchaser,—and, thirdly, that, even if this should be held otherwise, still the contingency provided for by the will has not been fulfilled in regard to the estates succeeded to, seeing that the estates settled (according to the plaintiff's own construction) on the marriage of 1810, comprised the whole of the estates devised by the will of 1797, while the defendant has succeeded only to a part of those estates, another part having been conveyed to Jonathan George Micklethwait conformably to the will of 1822, as the price of the Iridge estate.

We think it expedient to deal with the second of these points in the first instance, as the solution of the meaning of the words "heir male of the body," as used in the shifting clause, may be of material importance in ascertaining to which of the estates the testator has referred as the "property settled on the marriage of Nathaniel Micklethwait."

*857] In the course of the argument, it was pointed out by *the court, as the fact is, that, in reciting, in the will of 1822, the provisions of the will of 1797, with reference to this very property, the estate taken by the son of the tenant for life as tenant in tail after the determination of the life-estate, was throughout described as taken by such son as *heir of the tenant for life*,—clearly showing that the legal distinction between an estate-tail created by a limitation to a man for life, with remainder to the heirs of his body, and an estate for life to a man, with remainder in strict settlement to his son, and the son's heirs, in tail, was not present to the mind of the testator, and that the latter estate was considered by him as an estate of inheritance in the first taker; and that it must therefore be taken that such an estate ought fairly to be considered as having been intended to be described in the form of words used in the clause under consideration.

It was admitted by the counsel for the defendant, that it appeared from the rest of the will that the words had been used by the testator in the sense suggested; and the second point originally contended for was virtually abandoned. We shall see presently the importance of this in determining the question which we next proceed to consider, viz., which of the estates is meant to be referred to in the shifting clause.

We are of opinion that the property referred to as "settled on the marriage of Nathaniel Micklethwait," was, the estates dealt with on the second marriage, in 1810. It is true that there were two marriages, and that settlements were made on each, and that different estates were dealt with in making these settlements, from which some ambiguity might appear to arise: but, on closer examination, it appears to us plain that the estates devised by the will of 1797 are those referred to. It must be conceded, that, in neither instance, were any estates "settled,"

*858] in the strict legal sense of *the term, and that, to make the will sensible, recourse must be had to a more enlarged and popular

meaning of the term "settled." But, admitting this, it seems to us that in no sense of the word can it be said that any estates were "settled" on the marriage of 1804; while, on the other hand, we think that that term may have been intended to be applied, and was in fact applied, by the testator, to the estates appointed by him on the marriage of 1810. It is true there was a settlement in 1804; but it is not true that any "*property*" was "*settled.*" The estates then dealt with were already in strict settlement: the purpose of the new settlement was simply to charge them with a jointure-annuity in favour of the intended wife; and, to effect this purpose, the estates were disentailed and restored to the condition of estates in fee simple, so as to enable the owner to charge them as agreed. Now, the meaning of a "settled" estate, whether in legal or in popular language, as contradistinguished from an estate in fee simple, is understood to be one in which the powers of alienation, of devising, and of transmission according to the ordinary rules of descent, are restrained by the limitations of the settlement: it would be a perversion of language to apply the term "settled" to an estate taken out of settlement, and brought back to the condition of an estate in fee simple.

The same observations will apply to the same property, when dealt with on the settlement made on the second marriage of Nathaniel Micklethwait, in 1810. Here, again, the Hickling estates were merely charged with a jointure-annuity for the wife, and a term of years created for raising portions for the younger children: subject to these, the estates remained in Nathaniel Micklethwait in fee simple, and cannot, therefore, for the reasons already pointed out, be said to have been estates "settled on the marriage."

*We have next to consider whether the clause was intended to refer to the estates devised by the will of 1797. It is true that, [*859 strictly speaking, these estates were not settled on the marriage of 1810; they passed to Nathaniel Micklethwait for life, and his sons after him in tail, by virtue of the will of 1797 and the appointment of 1810: nevertheless, we are satisfied that it was to these estates that the testator intended to refer. It was his own proposal, as part of the settlement to be made on the marriage, to exercise his power of appointment in favour of his nephew; and, as soon as that appointment was made, the practical effect was, to pass these estates to Nathaniel for life, and his sons in tail male after him, in strict settlement. This having been done on the marriage, and as part of the settlement effected on the marriage, the testator might well refer to these estates as having been "settled on the marriage." It appears to us far more probable that he did so, than that he intended to refer to estates which had been taken out of settlement by cutting off the entail. But, if any doubt could remain on this head, it appears to us to be solved by reference to the term used, of "heir male of the body," which term is admitted to have been used by the testator to designate a first son taking as tenant in tail by purchase on the determination of the life-estate of his father. It is plain that such a description would not apply to the case of a son taking as heir-at-law to his father, tenant in fee simple. But, as we have seen, the Hickling estates were estates in fee simple. Moreover, as the union of the two estates, the contingency against which the testator was seeking to provide, would equally have arisen on a devise of the estate as on its

descending by inheritance, it is reasonable to suppose, that, had the testator been dealing with an estate in fee, which was not unlikely to be *860] *devised by will, he would have guarded against the case of the estate coming to the possessor of the Iridge estate by will, as well as against its coming to him by inheritance. On the other hand, the term "heir male of the body," taken in the sense in which it is admitted that the testator has used it in the will, is applicable to the estates devised by the will of 1797, and to them alone, seeing that these are the only entailed estates, and that to such the term, as used, is alone applicable.

On these grounds, we hold with the plaintiff, that the shifting clause was intended to apply to the union of the estates devised by the will of 1797 with the Iridge estate devised by the will of 1822.

We proceed to consider the third point made on behalf of the defendant, viz., that, if "the property settled on the marriage of Nathaniel Micklethwait" is to be held to be the estates devised by the will of 1797, the contingency guarded against by the shifting clause has not arisen, inasmuch as the defendant has not come into possession of the estates devised by the will of 1797, but only of a part of such estates, the Middlesex, Surrey, and London property having been made over to Jonathan George Micklethwait. In addition to which, from the alleged inapplicability of the general expression used in the clause to the succession to a part of the estates only, the defendant's counsel strongly contended that the shifting clause was intended to apply to the union of the Iridge estate with the estates devised by the will of 1797, in the event of the provisions of the first shifting clause not being adopted by Nathaniel Micklethwait and his son, and the Iridge estate devolving on the latter on failure of issue of John, the son of Jonathan George, according to the limitations of the will of 1822.

*861] To this argument it appears to us that two *satisfactory answers may be given. In the first place, such a construction would require a double contingency in order to give effect to the shifting clause, —not only the devolution of the estates devised in 1797 on the second nephew, by failure of issue of the first, but also the devolution of the Iridge estate on Nathaniel and his issue by failure of the issue of John, the son of Jonathan George Micklethwait; whereas, the former contingency alone is referred to in the preamble of the shifting clause. In the second place, such a construction appears to us to be inconsistent with the scheme of the will. Practically, the effect of the provisions of the will of 1822, as to the Iridge estate, was, to carry the estate to John Nathaniel Micklethwait for life and his sons in tail male, upon the condition of his joining with his father in conveying the Surrey, Middlesex, and London property to Jonathan George in fee; immediately after which follows the shifting clause in question. There can be little doubt that the testator expected that the arrangement which he desired in order to carry into effect his father's codicil, would be completed. We have no evidence as to the value of the Surrey, Middlesex, and London property: but it cannot be doubted that it was exceeded by that of the Iridge estate, seeing that Nathaniel Micklethwait and his son lost no time in making over the Surrey, Middlesex, and London estates, in order to secure the succession in remainder to the Iridge estate. Now, the shifting clause occurs immediately after the provisions for securing the

disposition of the property in the manner just pointed out; and it contains no reference to the non-completion of the desired arrangement. It appears to us that the reasonable construction to be put on the whole of the provisions of the will taken together, is, that the shifting clause in question was intended to take effect on the completion of the [*862 *arrangement contemplated by the testator as to the transfer of the Surrey, Middlesex, and London property, in the event of the rest of the estates becoming united with the Iridge estate by failure of the issue of the elder nephew, then in possession of the former; and that, consequently, the term "property settled on the marriage of Nathaniel Micklethwait," although general and unqualified, must be taken to mean that property short of that portion of it which it was part of the scheme of the will to have separated from it.

We are therefore of opinion that the estates referred to in the shifting clause are the estates which passed by the will of 1797, and which came to the defendant as first tenant in tail in remainder after the determination of the prior estate of his elder brother; that the character in which the defendant actually took the estates, was intended to be described by the term "heir male of the body" of his father; and that, consequently, the contingency provided for by the shifting clause has happened.

It follows that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Upon this judgment the defendant brought a writ of error, which came on for argument on the 5th of February, 1859, in the Exchequer Chamber, before Pollock, C. B., Erle, J., Martin, B., Crompton, J., Bramwell, B., Watson, B., and Hill, J.

Rolt, Q. C. (with whom were *Lush*, Q. C., and *R. E. Turner*), for the plaintiff in error (defendant below), submitted,—that the second shifting clause in the will of 1822 was inoperative, on the ground of ambiguity,—*that the estates devised by the will of 1797 were [*863 not "property settled" on the marriage of Nathaniel Micklethwait No. 2,—that the deed-poll of the 29th of November, 1810, was not a settlement of the estates devised by the will of 1797,—that the clause did not apply to the estates settled on either of the marriages of Nathaniel Micklethwait No. 2, as the plaintiff in error had not succeeded to those estates as "the heir male of his father,"—that the clause was inoperative, as the plaintiff in error had not succeeded to *the whole* of the estates devised by the will of 1797, or to the whole of the estates settled on the first or second marriage of his father,—that the alleged draft and instructions for the will of 1822 were inadmissible in evidence,—and that the will of 1852 was admissible. The following cases were cited:—Doe d. Hearle *v.* Hicks, 8 Bingh. 475 (E. C. L. R. vol. 21), 2 M. & Scott 759 (E. C. L. R. vol. 28), 1 Clark & F. 20, Thornhill *v.* Hall, 2 Clark & F. 22, Doe d. Luscombe *v.* Yates, 5 B. & Ald. 544 (E. C. L. R. vol. 7), 1 D. & R. 187, Clavering *v.* Ellison, 3 Drewry 451, Kiallmark *v.* Kiallmark, 26 Law J., Ch. 1, Scarisbrick *v.* Eccleston, 5 Clark & F. 398, Burrell *v.* Crutchley, 15 Ves. 544, Fazakerley *v.* Ford, 4 Simons 390, 1 Ad. & E. 897 (E. C. L. R. vol. 28), 2 N. & M. 1 (E. C. L. R. vol. 28), Taylor *v.* The Earl of Harewood, 3 Hare 372, and Harrison *v.* Round, 2 De Gex, M'N. & G. 190.

Atherton, Q. C. (with whom were *R. Clarke* and *Honyman*), for the defendant in error (plaintiff below), submitted,—first, that, on the death of Colonel Micklethwait, and on the defendant coming into possession of the 1797 estates, the shifting clause in the will of the 24th of October, 1822, took effect, and the Iridge estate became the property of the plaintiff below,—secondly, that it appeared by the case that the property known as the 1797 estates, was the property referred to by the testator of 1822 as the property settled on the *marriage of Nathaniel Micklethwait No. 2,—thirdly, that the language of the will of the 24th of October, 1822, and the other facts, show that the defendant (below) did succeed to the 1797 estates, in the character of the heir male of the body of Nathaniel Micklethwait No. 2, within the meaning of the testator of 1822,—fourthly, that, assuming that there *was* any ambiguity as to the property referred to, the instructions for the will of the 24th of October, 1822, and the draft of such will, were admissible in evidence to remove the same,—fifthly, that the said instructions clearly showed what was the property intended by the testator of 1822 as the settled property of Nathaniel Micklethwait No. 2,—sixthly, that the will of the 29th of May, 1852, was not admissible in evidence against the plaintiff below,—seventhly, that the fact of Nathaniel Micklethwait No. 2 and Colonel Micklethwait having complied with the wishes of the testator of 1822, by confirming the codicil of 1799, did not nullify the shifting clause. Cur. adv. vult.

*864]

MARTIN, B., now delivered the judgment of the court:—

This is error from the judgment of the Court of Common Pleas upon a special case. The action is ejectment to recover possession of an estate called Iridge, in the county of Sussex.

The material facts are these:—One John Micklethwait, being seised in fee simple of estates in Norfolk, Suffolk, Essex, Middlesex, Surrey, London, and Norwich, and in the county of Westmeath, in Ireland, by his will, dated the 4th of December, 1797, devised them to the use of his eldest son, John Micklethwait, for life; with remainder to his first and other sons in tail male; and, in default of such issue, and in case an appointment should be made by his said son John *Micklethwait, to the use of such one of his grandsons Nathaniel or Sotherton (the sons of a deceased son Nathaniel), as his son John should during his lifetime appoint,—to hold the same to such one of them during the term of his life, and, after the decease of such grandson to whom the estate should be appointed, to the use of the first son of the body of such grandson and the heirs male of his body, and, in default of such issue, to his second, third, and other sons in tail male. There were other limitations, which do not seem material.

*865]

The testator afterwards made an unattested codicil, whereby he proposed to revoke his will as regarded his estates in Surrey, Middlesex, and London, and to devise them to his son Jonathan George Micklethwait, in fee.

After his death, John Micklethwait entered into possession of all the estates, and during his lifetime acquired other real estates, principally from the family of his mother, whose name was Peckham, and part of which was the Iridge estate, the subject of the present question.

In the year 1804, Nathaniel, the grandson, being a minor, and entitled under a marriage-settlement made in 1782 to an estate-tail in certain

estates in Norfolk, called the Hickling and other estates, and being about to be married, on the 18th of January, 1804, executed a deed of covenant, whereby he professed to bind himself within three months after he attained twenty-one, to settle these estates to the use of himself for life, and, after his death, to the use that his wife should receive an annuity of 1000*l.* a year, and, subject thereto, to the use of himself in fee.

In January, 1805, having come of age, he suffered a recovery, and, by an indenture dated the 28th of that month, limited the use of these estates to himself in fee. *On the 14th of February, 1805, there was born an only child of this marriage, a son, afterwards Colonel Micklethwait. In October, 1810, Nathaniel Micklethwait was about to marry a second time, his first wife being dead, and proposals were made for a settlement. John Micklethwait was a party to these proposals; and ultimately it was arranged, that, in pursuance of the power given him by his father's will, he should immediately appoint all the estates thereby devised to Nathaniel and his male descendants, and that Nathaniel should charge his Hickling estate with a jointure of 1000*l.* a year for his intended wife, and make provision for her and the children of the marriage. In pursuance of this arrangement, John Micklethwait, on the 29th of November, 1810, executed a deed of appointment, and thereby,—after reciting his father's will, appointed to Nathaniel Micklethwait all the estates therein mentioned, from and after his own death without issue, to hold the same according to the form and effect of his father's will. [*866

On the 26th of December, a marriage-settlement was executed by Nathaniel Micklethwait, whereby the Hickling estate was conveyed to trustees to secure a jointure to his intended wife of 1000*l.* a year, and to raise 15,000*l.* for younger children, and, subject thereto, to the use of Nathaniel Micklethwait, in fee. This marriage took place in the same month; and the defendant in this suit is the eldest son of this marriage, and the plaintiff the second.

In the year 1822, John Micklethwait made his will, bearing date the 22d of October in that year: and the present question arises upon the construction of a shifting clause contained in it.

The will recites the will of his father, and the power of election and appointment thereby given to him, and that his father had by a codicil attempted to revoke *his will as to the Surrey, Middlesex, and London estates, and to devise them in fee to Jonathan George Micklethwait, but that the codicil, not having been duly executed, became inoperative; that he himself had exercised his power of election by appointing that after his decease without issue male, all the lands devised by his father's will should go to Nathaniel Micklethwait for his life, with remainder to his first and other sons in tail male; and that it was his wish that the codicil in his father's will should be confirmed, and the devise of the estates in Surrey, Middlesex, and London to Jonathan George Micklethwait in fee legally established. He then devised some annuities, and, subject thereto, he devised all his real estate in Sussex or elsewhere to trustees and their heirs, To the use of Sotherton Micklethwait for life, with remainder to his first and other sons in tail male, and, in default of such issue, to his brother Jonathan George for life, with remainder to a nephew, John, for life, and to his sons in tail [*867

male,—provided that, if his nephew Nathaniel and a son of his should in the lifetime of his brother Jonathan George effectually confirm the codicil of his father's will by conveying the estates in Surrey, Middlesex, and London, to him in fee simple, that then the limitation to Jonathan George and to John and to the first and other sons of John should cease, and immediately on such event, or otherwise in default of such issue as aforesaid, the testator's lands in Sussex and elsewhere should go and pass to the use of the defendant (the second son of Nathaniel), for life, with remainder to his first and other sons in tail male, and, in default of such issue, to the third and other sons of Nathaniel and their heirs, in tail male respectively, with the ultimate remainder in fee to his brother Jonathan George. Then there follows the clause upon which the present question arises. It is in substance *as follows:—

*868] "And as by possibility it may happen, that, after the second, third or other younger son of Nathaniel, or the heirs male of his body, shall, under the limitations aforesaid, have come into possession of my estates, the eldest son of Nathaniel, or his heirs male, may die and become extinct, so that such second or other younger son of Nathaniel, or his heirs male, *may become entitled to the property settled on the marriage of Nathaniel, in the character of the then heir male of his body:* Now, in order to prevent the union of the two estates in the same person whilst there is in existence a younger son, or an heir male of a younger son of Nathaniel, I direct, that, in case the second or other younger son, or the heirs male of his body, shall by the death or failure of the issue male of the eldest son become entitled to the said settled property of Nathaniel, as the heir male of his body, then the limitation in the will in favour of such second and other younger son shall immediately after such event cease, and the next younger son of Nathaniel, and the heir male of his body, shall become entitled to all my real estates in such manner and in every respect as if his eldest brother, or the issue male of his body, had been dead or become extinct." By a subsequent clause in the will, he directs that Sotherton Micklethwait and all others except Jonathan George who should become entitled to his estates, should take the name and arms of Peckham (his mother's family), jointly with those of Micklethwait.

The testator died in 1824. In 1826, Nathaniel and his eldest son, then Colonel Micklethwait, conveyed the estates in Surrey, Middlesex, and London to Jonathan George, in fee simple. In September, 1853, Sotherton Micklethwait died without issue, and the defendant entered into possession of the Iridge estate, by virtue of the limitation in the above will.

*869] *Nathaniel died in January, 1856, and Colonel Micklethwait, his eldest son, died in July of the same year; and thereupon all the property devised by the will of 1797, except the Surrey, Middlesex, and London estates, came to and was taken possession of by the defendant under and by virtue of the appointment executed by John Micklethwait on the marriage of Nathaniel in 1810; and the question now to be decided, is, whether the plaintiff, being his next brother, has thereupon become entitled to the Iridge estate by virtue of the shifting clause in the will of October, 1822.

It was contended, in the argument below, that, as the defendant became entitled to the estates mentioned in the will of 1797, excepting

the London, Surrey, and Middlesex estates, on the death of Colonel Micklethwait, the Iridge estate passed to the plaintiff, the third son of Nathaniel, by virtue of the shifting clause.

The contention on the part of the defendant was, that these estates did not answer the description of "property settled," and therefore that the shifting clause did not take effect; and, secondly, it was contended, that, if the testator meant the estates mentioned in the will of 1797, and dealt with in the settlement on the second marriage of Nathaniel in 1810, he meant *all* the estates there comprised; and, inasmuch as the London, Surrey, and Middlesex estates were taken out of that settlement, the shifting clause did not take effect.

The Court of Common Pleas gave judgment for the plaintiff; and this writ of error has been brought.

The case was argued at the sittings after Hilary Term, 1859; and we are of opinion that the decision of the Court of Common Pleas is right, and their judgment should be affirmed.

Upon the first point, looking at all the facts of the *case, we are clearly of opinion that the construction put upon the will by the Court of Common Pleas was right, and that the term "property settled," mentioned and referred to in the shifting clause, are the estates above referred to as devised by the will of the testator's father, of 1797, and mentioned in the settlement of 1810. [*870

As the reasons of the Common Pleas on this point are so clear and conclusive to our minds, we refrain from repeating the arguments. It is necessary, however, to go into our reasons for affirming the judgment of the Common Pleas, that the shifting clause took effect on the defendant becoming entitled to these estates, excepting the London, Surrey, and Middlesex estates, which were taken out of the settlement by the confirmation of the codicil, in pursuance of the wish expressed in the will of the testator John Micklethwait. This depends on the true intent and meaning of the will,—or, in other words, on the intention of the testator, to be collected from the will itself.

It was contended, that, to divest an estate already given, the clause must be clear, and be construed strictly. No doubt the intention must be manifest from the terms of the will. We adopt the expression on a similar question, of Sir L. Shadwell, V. C., in Fazakerly *v.* Ford, 4 Simons 415, "not to make the decision of such an important question depend upon the nice and accurate construction of any particular word; but we would rather construe the will by a fair and general interpretation of words, having regard to what is shown upon the face of the will to be the obvious intention of the testator."

It appears to us, in construing these clauses, that this was the meaning of the testator:—Looking at the clause of the will limiting the Iridge estate to the second son of Nathaniel, he studiously excludes the *eldest son of Nathaniel and his posterity from any interest in the Iridge estate; for, on failing the second and younger sons of Nathaniel, the reversion is devised to Jonathan George and his heirs for ever. The limitation to the second son of Nathaniel takes effect on the happening of either of two events,—first, if the codicil be confirmed,—secondly, if not confirmed, on failure of the issue of John, son of Jonathan George. In the first case, he takes the settled estates without the London, Surrey, and Middlesex estates: in the second, the whole of [*871

the settled estates would remain to him by force of the will of 1797. In thus far separating the Iridge estate from the settled estates, he directs, in either case, whilst the second and younger sons take the Iridge estate, Colonel Micklethwait, as first son, would take the settled estates with or without the estates mentioned in the codicil: and, if there had been male issue of Colonel Micklethwait, the testator clearly manifested an intention that these estates should go in separate and distinct lines. That seems his intention: so that he treats the remaining part of the estates in the will after the confirmation of the codicil, as settled estates. That being the testator's intention, what is the intention to be collected from the shifting clause, which is to operate upon and control the limitations to the second and younger sons? The testator expresses what his intention is, viz. "*In order to prevent the union of the two estates in the same person, whilst there is in existence a younger son or an heir male of the younger son, I direct*, &c." Now, what two estates does the testator mean? One estate is, the Iridge estate. The other is, the property settled on the marriage of Nathaniel. This may mean the whole property settled, or the property settled after the codicil is confirmed. We think it means both, according to the event. One *872] great object of the testator manifestly *was, the confirmation of the codicil in favour of his brother Jonathan George; and certainly, when confirmed, the two estates were to go in different lines, to the exclusion of the eldest son from the Iridge estate. The words bear out that construction,—"And as, by possibility,"—which may mean that then the estates might not be disentailed,—"that, from and after the second and other sons or their issue, &c., *shall, under the limitations aforesaid*," have come into possession of my said hereditaments. The limitations *aforesaid* to them is in one of two events, either on the confirmation of the codicil, or on failure of issue of John, the son of Jonathan George. If it means limitation in either event, then the words "property settled" would mean either the whole or a part. And it is, if by the death of the eldest or otherwise the heirs of his body may become extinct, the second or younger son or his heir may become entitled to property settled. Neither the limitation nor the shifting-clause shows that the testator meant "property settled" otherwise than such settled property as would come to the second or younger son by death or failure of issue of the eldest son. And we think the intention of the testator expressed in the will, is, that, when such property comes to the second son, the Iridge estate shall go to the third son. We are, therefore, of opinion that the words "settled property" are to be taken distributively, and that such was the meaning and intention of the testator to be collected from the will; and that, after the defendant came into possession of the settled estates, the plaintiff became entitled under the shifting clause to the Iridge estate.

It is therefore our opinion that the judgment of the Court of Common Pleas ought to be affirmed. Judgment affirmed. (*a*)

(*a*) This judgment was acquiesced in.

IN THE HOUSE OF LORDS.

BAGSHAW *v.* SEYMOUR. *June* 29.(*a*)

B., the chairman of a mining company, by falsely representing to the Stock Exchange that two-thirds of the shares had been taken and paid upon, procured the stock to be entered in the official list. S., a stranger, knowing the rule, that such stock was not admitted into such list unless two-thirds of the capital had been paid up, and seeing the stock so entered, and relying on the insertion having been procured by honest means, bought some shares from a jobber on the Exchange:

Held (affirming the judgment of the Exchequer Chamber in accordance with the ruling of Jervis, C. J.), that S. had a right of action against B. for the fraudulent representation, and there was evidence for the jury of the fraud.

THIS was an action for a fraudulent representation by a director of a mining company.

The action was commenced in the Court of Common Pleas on the 18th July, 1854.

The declaration alleged that the defendant and others had associated themselves together as a company called "The Lake Bathurst Australasian Gold Mining Company," established on the cost-book system for working certain mines in Australia; that the defendant and others, representing themselves to be the board of management of the said company, allotted and issued shares, and issued and circulated, for the purpose of inducing persons to purchase the said shares, a certain prospectus containing a statement that the capital of the company was 100,000*l.* in 100,000 paid-up shares of 1*l.* each, without any further call or liability; and whereas before and at the time of issuing such prospectus it was, as the defendant well knew, publicly known and understood, and the fact was, that the committee of the Stock Exchange would not appoint a settling day for shares in any mining company, or permit the same to be inserted in the official list of the said committee until it had been represented to the said committee, and they had been induced to believe, that the subscription list of such company was full (with the exception of such shares as might be reserved for special purposes), that not less than two-thirds of the scrip had been paid upon and were ready to be issued, and that there was no impediment to the settlement of the account; that the defendant and the said other persons, in order to procure the insertion of the shares of the said company in the official list of the said committee, and to induce the said committee to appoint a settling day for the said shares, and thus to induce persons to purchase shares in the said company, in the belief that their insertion in the said list had been procured by fair and honest means after the issuing of the said shares and prospectus, and before the plaintiff purchased any shares, falsely and fraudulently represented to the said committee that 40,000 shares had been bonâ fide reserved for the purpose of completing the purchase of the land, that nineteen shares had been bonâ fide kept for circulation in the colony of Australia, and that the residue, viz., 40,711 shares, had been paid upon and for all which scrip certificates had been issued or were ready for delivery, and in order to induce the committee so to believe, the defendant and others falsely and fraudulently represented to them that the produce of the said residue had been

(*a*) 32 Law Times Rep. 81.

received by and then was in the hands of their bankers, and thereby the defendant and the said others, for the purpose aforesaid, induced the said committee to believe the said representations to be true, and that there was no impediment to the settlement of the account, and influenced by and acting on such belief the said committee inserted the shares of the said company in the official list of the said committee, and appointed a settling day for shares in the said company. It was further alleged that afterwards, and whilst the said shares were so inserted in the said official list, the plaintiff having notice of the prospectus and having seen the said shares quoted in the official list of the said committee of the Stock Exchange, and believing that the same had been admitted and inserted by fair, honest, and proper means, and that no less than two-thirds of the scrip had been paid upon and was ready for delivery, and that the subscription list was full with the exception aforesaid, was induced to purchase, and did purchase on the Stock Exchange, of one John Barclay, one hundred shares in the said company for the price or sum of 93*l.* 15*s.*, being part of the shares so issued by the defendant and others as aforesaid. It then alleged that the defendant in and by the said several representations deceived and defrauded the plaintiff in this; that neither at the time of making the said representations to the said committee of the Stock Exchange, nor at the time when the shares of the company were inserted in the said official list, and when the plaintiff saw them, nor at any other time, had 40,000 or any shares been bonâ fide reserved, &c., nor had 19,289 shares been reserved, &c., nor had the said 40,711, nor two-thirds of the said scrip, with the exception aforesaid, been subscribed for or paid upon, nor were they ready to be issued or delivered, nor had the produce thereof been received by, nor was it in the hands of their said bankers; and the said shares ought not to have been inserted in such official list; all which the defendant always well knew. By means of which said several premises the shares so purchased by the plaintiff were of no value, &c. And the plaintiff claims 150*l.*

Pleas:—1. Not guilty. 2. The plaintiff was not induced for the cause alleged to make the purchase in the declaration mentioned. 3. The plaintiff did not purchase as alleged. Issue thereon.

At the trial, which took place before Jervis, C. J., at the London sittings on the 23d June, 1855, the plaintiff gave in evidence as follows:—The defendant was the chairman of the directors, and had published the prospectus in the declaration mentioned, and issued some shares for sale, including those bought by the plaintiff. There was a rule on the Stock Exchange, known to the plaintiff and defendant, to the effect stated in the declaration. That the defendant and other directors addressed a letter to the committee of the Stock Exchange, alleging that their share list was full, with the exceptions stated in the declaration, and that two-thirds of the scrip had been paid on and were issued or ready for delivery. In order to satisfy the Stock Exchange of this fact, they procured by loan, or otherwise than by sale of shares, a sum of 35,000*l.*, which they paid into the bank, and procured from the bankers certificates, which they enclosed, purporting that the sum in question stood to the credit of the company; and immediately afterwards, when the Stock Exchange had appointed a settling day, the said sum was withdrawn by checks signed by the defendant and others. The plaintiff further proved that the statements in the letter were false to

the knowledge of the defendant, and that two-thirds of the scrip had not been paid upon; but that the Exchange Committee acted on the faith of the banker's certificate, and appointed a settling day. The plaintiff saw the shares quoted in the official list, and on the faith of the rule having been complied with, bought the shares from a jobber in the market.

The defendant's counsel insisted that there was no evidence to go to the jury, and that there was no proof of any fraud by the defendant, or that the damage, if any, was brought about by such fraud, if any; that the evidence did not show any contract between the plaintiff and the defendant, nor any duty in the defendant as between him and the plaintiff, nor any connection between them in respect of the subject-matter in question, to entitle the plaintiff to recover on the facts proved.

The learned judge, however, told the jury that, if the plaintiff was induced by seeing the shares quoted in the official list of the Stock Exchange, to purchase the same, and if the jury believed that the insertion of the said shares in such list was procured by the false and fraudulent representations of the defendant, then the plaintiff was entitled to recover. A bill of exceptions was then tendered, and the jury gave their verdict for the plaintiff, damages, 93*l.* 15*s.*

Error being suggested to the Exchequer Chamber, the counsel for the plaintiff in error did not in that court argue the matter, being advised that it would be desirable to bring the case before the House of Lords, and the judgment of the Common Pleas was thereupon affirmed without argument.

Error was then suggested to the House of Lords, and the plaintiff in error gave the following reasons for reversal in his printed case:—"The declaration does not disclose a matter which is properly the subject of an action by the plaintiff below against the defendant below. That it shows no contract express or implied between them, and no duty as between them, the breach of which can be the subject of an action. That for aught that appears by the declaration John Barclay, the seller of the shares to the plaintiff below, had purchased them from another who had also purchased them under the same circumstances as those disclosed by the declaration relating to the plaintiff; and that if the plaintiff is entitled to maintain this action, any person who had been at any time a purchaser of any one share under the same circumstances would be entitled to maintain a similar action—a proposition for which the defendant submitted there was no authority."

In the defendant in error's printed case the following reason for affirming the judgment was given:—"Because a false and fraudulent representation made by A. to the public, calculated and intended to deceive by inducing persons to purchase for value that which is worthless, affords a ground of action against A. to any person who is deceived and who purchases and suffers damage thereby, in the same manner and to the same extent as if the representation had been made directly by A. to such person."

C. Clark, for the plaintiff in error, on the case being called, said, that he did not think he could usefully occupy the time of the House by arguing it, and would at once submit to a judgment for the defendant in error.

Quain, for the defendant in error.

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2. Therefore, where, in an action by a father for injury resulting from the death of his son through the negligence of the servants of a railway company, it appeared that the son, who was twenty-seven years of age, and unmarried, but living away from his parents, had for the last seven or eight years been in the habit of visiting them once a fortnight, and of taking them on those occasions presents of tea, sugar, and other provisions, besides money, amounting in the whole to about 20*l.* a year:—Held, that the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from the continuance of his son's life as to entitle him to recover damages under the statute. *Id.*

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1. In July, 1850, A. and B. gave C. a guarantee (continuing) for goods to be supplied to D., with a stipulation that the security should subsist "until C. received a notice in writing to the contrary." Goods were supplied to D. upon the faith of this guarantee, and a balance exceeding 200*l.* was due in respect thereof. In June, 1854, B. became bankrupt, and duly obtained his certificate. No notice having been given to determine the guarantee:—Held, that B.'s liability thereon was a "contingent liability" within the 178th section of the 12 & 13 Vict. c. 106, and consequently that his certificate was a bar to a claim in respect of goods supplied to D. after the bankruptcy of B. *Boyd* v. *Robins*, 749. [Reversed by the Exchequer Chamber: vide post Vol. V.]

Deed of Arrangement under 12 & 13 *Vict. c.* 106, *ss.* 224 *et seq.*

2. To a scire facias suggesting a further breach of a bond, the defendant pleaded,—secondly, that, after the commencement of the action, and before the issuing of the scire facias, he was a trader, &c., and indebted, &c., and suspended payment; and that thereupon "a certain memorandum of arrangement within the meaning and according to the provisions of the said statute" (12 & 13 Vict. c. 106) was made between him and the several persons whose names were thereunto subscribed, being creditors, &c.; that "*all things were performed and done as required by the said statute to make the said memorandum of arrangement an obligatory instrument within the terms of the said statute* upon all the creditors of the defendant;" that the plaintiffs were creditors, and, after the said suspension of payment, and after the said memorandum of arrangement had been so signed, and before the issuing of the scire facias, had notice; and that the defendant and the parties of the other part had at all times since the making of the memorandum of arrangement well and truly observed the agreements, &c., therein; and that, by reason of the premises, and by force of the statute, the said memorandum of arrangement became and was and is as obligatory on the plaintiffs as if they had signed the same.

The third plea set up a judge's order, made by consent, whereby the proceedings were ordered to be stayed on payment of costs, and averred that the costs were duly paid.

Held, that the second plea was bad, inasmuch as it disclosed nothing to show that the memorandum of arrangement was a bar to the action. *Tabor* v. *Edwards*, 1

3. *Semble*, that such a deed must, to satisfy the 224th section of the 12 & 13 Vict. c. 106, contain an absolute assignment of *all* the debtor's property for distribution amongst his creditors; and *semble*, that the plea should have alleged that such a notice was given as is required by s. 225. *Id.*

4. Held, also, that the third plea was bad. *Id.*

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1. A dealer (in London) in shares in a public company (whether British or Foreign), is a "broker" within the statute 6 Ann. c. 16, and incapable of suing for commission, unless duly licensed. *Smith* v. *Lindo*, 395

2. But, where an unlicensed person had assumed to act as a broker in the purchase of such shares—Held, that he might recover from his

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2. Held also, that the crossing, though made by the drawer himself, forms no part of the check itself, and consequently that its erasure does not amount to a forgery, *Id.*

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2. *Joint.*]—A box containing goods, some of which were the property of A., and some the property of B., was delivered on their behalf by a third person at a railway station, to be carried from Worthing to London. The box was addressed to A., and was received by him in London, and he paid the carriage:—Held, that there was evidence of a joint bailment in respect of which a joint action might be brought by A. and B. for the loss of the goods. *Metcalfe* v. *The London, Brighton, and South Coast Railway Company*, 317

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3. A., who resided at Manchester, contracted to buy of B., of Dumfries, a quantity of oak-bark, to be shipped "for delivery at Liverpool." B. accordingly shipped the bark, to be delivered at Liverpool to the defendants, who were wharfingers and carriers there, to be by them forwarded to A. at Manchester. The bark was to be paid for in cash; and B. sent a bill of lading, making it deliverable to "A. or his assigns," together with a bill of exchange payable on demand, through his bankers, to the Manchester and Salford Bank, with instructions to present the bill for acceptance. The bank at Manchester were unable to find A., and accordingly they returned the bill of lading and draft to B. Before the bill of lading had been so returned, B., who was at Liverpool when the bark arrived there, believing from the representations of an agent of the plaintiff (who had bought the bark of A.), that the bill of lading had been duly handed over to A., assented to the bark being delivered to the defendants for the purpose of its being carried to Manchester for the plaintiff; but, upon subsequently discovering that A. had not got the bill of lading or paid for the bark, B. claimed and received it from the defendants:—

Held, that, under the circumstances, the property in the bark never passed to A., and consequently that B. had a right to countermand the delivery; and that it was competent to the defendants, notwithstanding they had received the bark to be carried for the plaintiff, to set up the title of B., in an action brought against them by the plaintiff. *Sheridan* v. *The New Quay Company*, 618

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5. *Evidence of Felony.*]—In an action against a railway company, as common carriers, for the loss of goods, the defendants pleaded a plea founded upon the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, s. 1, that the value of the goods exceeded 10*l.*, and was not declared at the time of the delivery to them; to which plea the plaintiffs replied that the loss arose from the felonious acts of servants of the company. It was proved that the goods in respect of which the action was brought consisted of articles of jewelry, &c., contained in a tin box, which was enclosed in a deal box fastened with a padlock; that the box was brought to the company's station at Worthing, by a servant of a person in whose house the plaintiffs had lodged, to be forwarded to the plaintiffs in London; and that, when the box was delivered to the plaintiffs there by a porter of the company, it was found that the outer box had been opened, and the tin box and its contents abstracted from it:—Held, no evidence for the jury of a felony by the company's servants. *Metcalfe* v. *The London, Brighton, and South Coast Railway Company*, 311

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Section 27. *Defence upon the Merits.*

2. Where judgment has been signed (for default of appearance) upon a writ specially endorsed under the 25th section of the Common Law Procedure Act, 1852,—the affidavit in support of an application by the defendant to be let in to defend, under the proviso in s. 27, must not merely state that he has "a defence upon the merits," but must *disclose* or *make known* the nature of such defence, in order that the judge may see that it really amounts to a defence. *Whiley* v. *Whiley*, 653

COMMON LAW PROCEDURE ACT, 1854.

Section 11. *Agreement to refer.*

1. By a contract for the sale of a parcel of white Bombay sessame seed (paid for on receipt of the shipping documents) "warranted when shipped of fair merchantable quality, and equal to the fair average," it was provided that any dispute arising out of the contract should be settled in London by the usual mode of arbitration, but that the contract should not be void on that account. An action having been brought by the buyers to recover damages for the breach of warranty, the declaration in which alleged that the plaintiffs had sustained damage by having resold and converted a great part of the seed into oil before they discovered or could reasonably discover the breach of warranty,—the court stayed the proceedings, under the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, there being nothing on the record to show that any question of fraud could arise, and nothing in the affidavits to show such an alteration of circumstances as to induce the court to withdraw the matter from the mode of investigation which the parties themselves had selected. *Hirsch* v. *Im Thurn*, 569

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2. *Quære*, whether a notice of attachment out of the Lord Mayor's Court, London, is any answer to an order under the garnishee clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125? *Newman* v. *Rook*, 434

3. At all events, service of such a notice upon the vestry-clerk of a parish without the limits of the city can have no operation upon a debt due from the vestry to the judgment-debtor. *Id.*

4. To entitle the garnishee to a writ under s. 64, he must satisfy the court or judge that he has a real ground for disputing his liability for the debt, *Id.*

COMPENSATION.

See SALE, 3.

COMPUTATION OF TIME.

See TIME.

CONSOLIDATION RULE.

See PRACTICE, 6.

CONTINGENT LIABILITY.

See BANKRUPT, 1.

CONTRACT.

Construction of.

1. *To deliver goods "on arrival" of a given ship.*]—Where there is an agreement to deliver goods on a condition which, without any default on the part of the vendor, never happens, he will not be liable for a non-delivery: but, where the agreement is absolute, or conditioned on an event which happens, the vendor will be liable for a breach, though

without default on his part; for, it is his own heedlessness, if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. *Hale* v. *Rawson*, 85

2. The defendants contracted to sell to the plaintiffs 50 cases of East India tallow, at 48*s.* 6*d.* per cwt., to be paid for by the plaintiffs in cash fourteen days after finishing the landing thereof; to be delivered by the defendants to the plaintiffs on safe arrival of a certain vessel called The Countess of Elgin, then on passage from Calcutta to London:—Held, that this was an absolute contract to sell and deliver the tallow provided *the ship* arrived, and that the defendants were liable for a breach, notwithstanding that the non-delivery was occasioned by the ship's arrival (through no default on their part) without the tallow on board; and that the stipulation as to payment fourteen days after finishing the landing introduced no additional condition, *Id.*

3. *Retractation.*]—The defendant, on the 19th of August, 1853, contracted to purchase of the plaintiff a parcel of Chassum waste-silk, "to arrive in all probability in January and February next, but further particulars will be furnished respecting the name of the ship or ships in the next mail or on receipt of the next after that." The second mail after the 19th of August arrived in London on the 19th of September. No name of any ship was then communicated to the defendant; and, on the 18th of January, 1854, the defendant wrote,—"We give you *one week* from this day's date to give to us the name of the ship on which the 20,000 lbs. of Chassum is on board, and, in default of your compliance with our request, we shall consider the same as a breach of the contract of the 19th of August last." To this the plaintiff replied on the same day,—"I am happy to be able to remove the uneasiness you feel respecting the arrival of the 20,000 lbs. Chassum to your contract of 19. 8. 53, by informing you that it is already arrived, and that you will receive invoice in due course." On the 19th, the defendant wrote,—"Your letter of yesterday is not an answer to ours of the same date, which required the name of the ship on which the Chassum had been shipped; and this is the information which we now again call for: but, as you say the Chassum has arrived, there is no occasion for the delay of a week in giving the information, which we now ask for *in the course of to-morrow*; in default of which we shall act as indicated in our letter of yesterday." The names of two ships were given on the 24th and 25th of January:—

Held, that the defendant's offer to renew the contract not having been in terms accepted by the plaintiff, the defendant was at liberty to retract it; and that his letter of the 19th of January was a sufficient retractation. *Gilkes* v. *Leonino*, 485

Statement of Consideration.

4. The declaration stated, that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange (describing them), and to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised the plaintiff, that, if he should succeed in procuring the bills or either of them to be discounted, he would apply the proceeds in a given way: averment that the defendant did succeed in procuring the bills to be discounted, but that he failed to apply the proceeds as agreed:—Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration for the defendant's promise. *Hart* v. *Miles*, 371

Damages in Action of,—See DAMAGES.

And *see* BROKER, 2.

CONVERSION.

Evidence of.

By the 143d section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, after the 1st of January, 1856, no building is to be erected beyond "the regular line of buildings in the street in which the same is situate."

The plaintiff having erected a building in contravention of the 143d section of the 18 & 19 Vict. c. 120, a resolution of a vestry was passed directing their surveyor to demolish the portion which encroached beyond the line. The surveyor having taken down the offending building, placed the materials within a hoarding on the carriage-way, and afterwards removed them to the parish stone-yard, and detained them there *as a security and pledge for the costs and expenses of so taking down the building*, in the bonâ fide belief that he was entitled so to do under the resolution of the vestry; and the case (settled by an arbitrator) found that the plaintiff could not have obtained the said materials back, without paying the said costs and expenses:—Held, a conversion. *Tear* v. *Freebody*, 228

COPYHOLD.

Surrender and Admittance.

1. The admittance of tenant for life upon a surrender to the use of the will, enures as the admittance of those in remainder, so as to vest the estate in them. *Smith* v. *Glasscock*, 357

2. A testator devised copyhold land to his widow for life, remainder to his six children, three sons and three daughters, in equal shares, as tenants in common. After his death, his widow was duly admitted. The widow died, and two of the daughters also died unmarried and intestate: but there was no evidence as to the third daughter. One of the sons went abroad, and never was heard of. The second was proved to be alive. The third, in 1843 (his mother and two sisters being then dead), got himself admitted in respect of three-sixths of the land; and in 1845, in default of claim by the other remainder-men, after proclamation, got admitted to the rest as heir-at-law of the person last seised. In 1850, he covenanted to surrender five-sixths of the land to the plaintiff, and the plaintiff was thereupon admitted by the lord:—Held, that the plaintiff thereby obtained no title to more than four-sixths,—even as against one having no title, but a bare possession. *Id.*

CORPORATION.

Service of Process upon a Foreign Corporation,—See PRACTICE, 2.

[*Liability of Officers for False Representation,—See* FRAUDULENT REPRESENTATION.]

COST-BOOK MINE.

Payment of Calls, how Enforced.

It is not competent to the adventurers or shareholders in a cost-book mine to stipulate by their rules that unpaid calls shall be recovered as a debt due from the defaulting shareholder to *the purser*. *Hybart* v. *Parker*, 209

COSTS.

Application for, under 15 & 16 *Vict. c.* 54, *s.* 4.

The plaintiff recovered 40*s.* only in an action under Lord Campbell's Act; and the judge on the 21st of August refused to grant a certificate under the 13 & 14 Vict. c. 61, s. 12, that the cause was proper to be tried in the superior court. In the following Michaelmas Term, the plaintiff applied by summons for costs under the 15 & 16 Vict. c. 54, s. 4, and the judge endorsed thereon "no order." An application to the same effect was made to the court in Hilary Term:—Held, that this was in effect *an appeal against the decision of the* 21*st of August*, and therefore that the motion was too late. *Craske* v. *Smith*, 446

COUNTY COURT.

Jurisdiction of.

1. *Friendly Society.*]—The county court has, by the 18 & 19 Vict. c. 63, ss. 40, 41, 42, jurisdiction to determine a dispute between the committee of management of a friendly society and any of its members, as to the propriety of the mode of convening and the manner and place of holding special general meetings for the purpose of altering or amending the rules of the society. *In re Hoey and M'Farlane*, 718

Authority of Deputy Judge.

2. A plaint was heard before a deputy-judge of a county court, and he, after the death of the judge whose deputy he was, sent a written statement of his decision to the late judge's successor, who received and entered it as his judgment. The court (without expressly deciding that the judgment so entered was void) granted a rule nisi for a prohibition against proceeding upon it, in order to give the parties an opportunity of applying to the new judge for a rehearing. *Id.*

Appeal.

3. *Alteration of case.*]—*Semble*, that the county court judge has (under the 15th section of the 13 & 14 Vict. c. 61, and the 145th of the rules of practice issued under the authority of the 19 & 20 Vict. c. 108, s. 32) no power to alter or add to an appeal case after it has been agreed on and signed by the parties or by their attorneys. *Warner*, app., *Riddiford*, resp., 180

And *see* FALSE IMPRISONMENT.

Prohibition.

4. A mere assertion of title will not oust the jurisdiction of the county court: the title must be bonâ fide brought into question. *In re Emery and Barnett*, 423

5. A. was let into possession of premises as tenant to B., and paid him rent. C. claiming title, A. gave up possession to him in consideration of a sum for crops. In an action in the county court by B. against A., to recover arrears of rent, and also possession of the premises,—Held, that whether C.'s title could be set up or not, depended upon whether A. had been evicted by title paramount, or had voluntarily yielded up possession. *Id.*

6. *Title to land.*]—It is not necessary that the grounds for issuing it should appear in a rule or order for a prohibition. *Everefield* v. *Newman*, 418

7. A. was found taking sand from premises in the occupation of B. (under a lease), and was given into custody by B. on a charge of stealing it. On appearing before a magistrate, A. denying that B. had any right to the land, the charge was dismissed as involving a question of title. A. afterwards sued B. in the county court for false imprisonment. A prohibition having issued under a judge's order,—the court set it aside, on the ground that no question of title could arise on the hearing. *Id.*

And *see* COSTS.

COVENANT.

Joint or Several Remedy on.

1. W. F. covenanted with A., B., and C., to whom he had severally mortgaged certain unfinished messuages, to complete the premises by a given day; and A., B., and C. severally covenanted with W. F. to make him certain periodical advances. In consideration of the arrangement thus entered into with W. F., D. and E. jointly and severally guarantied to A., B., and C., that W. F. should duly perform his covenant with them, —their joint and several liability under the guarantee not to exceed 100*l.* Default having been made by W. F.,—Held, that A., B., and C. might recover to the extent of the 100*l.* in a joint action against D. and E., in respect of damages sustained by them, or either of them, from W. F.'s breach of covenant. *Pugh* v. *Stringfield*, 364

Right of Re-entry for Breach of.

2. A right of re-entry for breach of a covenant in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach, with knowledge of its existence. *Dendy* v. *Nicholl*, 376

To pay Premiums of Assurance,—See INSURANCE, 2.

Covenant not to sue,—See RELEASE.

CUSTOM OF TRADE.

See MASTER AND SERVANT, 1.

DAMAGES.

Measure of.

In action of contract.]—A. contracted with B. to repair a steam threshing-machine, undertaking to get it ready for harvest time. A new fire-box being needed, C. engaged to make one for A. "in about a fortnight," but failed in the performance of his contract, and A. (who had paid C. for the article) was obliged to get one made elsewhere, at an additional cost; but this he did not do in time to enable him to perform his contract with B. (although there was ample time for him to have done so after C. had broken *his* contract); whereupon B. sued A., who paid him 20*l.* to settle the action:—Held, that A. was entitled to recover from C. the sum he had paid him for the fire-box, and the extra cost incurred in getting another; but that the compensation paid by A. to B. was not such a damage "as might fairly and reasonably be considered either as arising naturally from C.'s breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it,"—within the rule in Hadley v. Baxendale, 9 Exch. 341.† *Portman* v. *Middleton*, 322

And *see* COVENANT, 1. INSURANCE, 2.

DEBTORS' ARRANGEMENT.

See BANKRUPT, 2, 3, 4.

DEPOSIT.

See SALE, 1, 2.

DEPUTY JUDGE.

See COUNTY COURT, 2.

DEVISE.

Construction of.

John M.,—who possessed estates called the H., B., and T. estates, in Norfolk, and also other estates in Norfolk, Suffolk, Surrey, Middlesex, and London, and also in the county of Westmeath,—had three sons, John, Nathaniel, and Jonathan George.

On the marriage of his second son, Nathaniel, John M., by settlement of September, 1782, settled the H., B., and T. estates, after a prior life-estate to himself, and a provision as to pin-money for the intended wife, to the use of Nathaniel for life, remainder to such son of the marriage as Nathaniel should appoint, and, in default of appointment, to the use of the first and other sons of the marriage, in tail male, with remainder to the settlor in fee. There was issue of this marriage two sons, Nathaniel and Sotherton, the former of whom on the death (in 1786) of his father (no appointment having been made pursuant to the power) succeeded to the H., B., and T. estates, as first tenant in tail.

By his will, of December, 1797, John M. devised his other real estates,—to the use of his eldest son, John, for life, with remainder to his first and other sons successively in tail male; and, in default of such issue, to the use of such one of his two grandsons, Nathaniel and Sotherton, sons of his late son Nathaniel, as his son John should by deed or will appoint, for life, remainder to the first and other sons of such appointee successively in tail male, remainder, in default of issue, to the other of his two grandsons for life, remainder to the first and other sons of such grandson successively in tail male; and, in case of default of any such appointment by John, the testator devised the estates to the eldest of his two grandsons, Nathaniel, for life, with remainder to his first and other sons successively in tail male, with remainder, on failure of such issue, to his second grandson, Sotherton, for life, and to his sons

successively in tail male; and, on failure of such issue, to his (the testator's) third son, Jonathan George, for life, and to his sons successively in tail male; remainder to the testator's own right heirs.

By an unattested codicil, the testator professed to revoke the foregoing devise so far as it regarded the estates in Surrey, Middlesex, and London, and to devise these to Jonathan George, in fee.

Upon the death of John M. (in 1799), his eldest son, John, entered into possession of the estates comprised in the will of 1797, and continued in possession until his death, in 1824.

In 1804, Nathaniel (grandson of John M.), being about to marry, executed what purported to be a marriage-settlement, to which John, his uncle, was a party,—whereby, after reciting the settlement of 1782, he covenanted, with the consent of his guardians, within three months after he should have attained the age of twenty-one, to settle and assure the H., B., and T. estates to the use of himself for life, and, after his decease, to the use and intent that his intended wife should during her life receive a jointure-annuity of 1000*l.*, and, subject thereto, to the use of himself in fee. In pursuance of this covenant, Nathaniel, by an indenture of the 28th of January, 1805, and a recovery suffered in pursuance thereof, barred the entail in these estates. The only issue of this marriage was a son, Nathaniel Waldegrave (afterwards Colonel M.).

In 1810, Nathaniel (grandson of John M., being about to contract a second marriage) proposals for a settlement, to which John, the uncle, was a party, were drawn up and agreed to; and, on the 29th of November in that year, the latter, in exercise of the power given to him by the will of 1797, appointed the estates thereby devised to Nathaniel, to hold according to the terms of that will. By the settlement thereupon made, Nathaniel conveyed the Hickling estate to trustees, to the use of himself for life, remainder to the intent that his intended wife, in case she should survive him, should receive thereout a jointure-annuity of 1000*l.*, and, subject thereto, to the use of the trustees for a term of 1000 years for securing the annuity and for raising 15,000*l.* for the portions of the younger children, and, subject thereto, to the use of himself in fee: and he further covenanted with the trustees, as soon as he should come into possession of the other estates by virtue of the will of 1797 and his uncle's appointment, to charge those estates with a further annuity of 500*l.* in favour of his intended wife, and, so far as he was able, he thereby limited and appointed to her the said annuity, to be payable out of the said estate.

There were several children of this marriage,—of whom the defendant in this action was the eldest, and the plaintiff the second.

John, the tenant for life under the will of 1797, having through his mother's family become possessed in fee-simple of certain real estates, and, amongst others, of one in Sussex called the Iridge estate, and being childless, in the year 1822 made his will, whereby,—after reciting his father's will, and his desire that the attempted codicil thereto should be confirmed, and the devise therein of the lands in Surrey, Middlesex, and London, to his brother Jonathan George, in fee, should be established,—proceeded to devise the Iridge estate to trustees, first, to the use of his nephew Sotherton for life, remainder to the first and other sons of the body of Sotherton successively in tail male; secondly, in default of such issue, to his (the testator's) brother Jonathan George for life, remainder to his nephew, John, eldest son of Jonathan George, for life, and to the first and other sons of John successively in tail male. Then followed two shifting clauses, the first of which provided, that, if the testator's nephew Nathaniel and his first or other son or sons, or his or their heirs, should, in the lifetime of Jonathan George, effectually confirm and establish the codicil to the will of 1797, by effectually conveying the lands in Surrey, Middlesex, and London to Jonathan George in fee, then the foregoing devise in favour of Jonathan George and of his son John and his first and other sons in tail male, was to become void, and, immediately on such event, or otherwise in default of issue of the testator's nephew John, the estate was to pass to the testator's great-nephew John Nathaniel (second son of his nephew Nathaniel) for life, remainder to the first and other sons of John Nathaniel, in tail male, remainder to the third, fourth, fifth, and every other son of his (the testator's) nephew Nathaniel (excepting always the eldest son), successively, in tail male, with remainder, in default of issue, to Jonathan George in fee.

Then followed the second shifting clause, upon which the contest mainly arose,—"And as by possibility it may so happen, that, from and after the second, third, fourth, or other younger son of my said nephew Nathaniel, or the heirs male of his or their respective body or bodies, shall, under the limitations aforesaid, have come into possession of my said hereditaments and real estate, the eldest or elder son of my said nephew Nathaniel, or the heirs male of his body, may die and become extinct, so that the second or other younger son of my said nephew Nathaniel, or the heirs male of the body of such second or other younger son, may become entitled to *the property settled on the*

marriage of the said Nathaniel, in the character of the then heir male of his body,—now, in order to prevent the union of the two estates in the same person whilst there is in existence a younger son, or an heir male of the body of a younger son of my said nephew Nathaniel, I do by this my will direct and declare, that, in case the second, third, fourth, or other younger son, or the heirs male of the body of such younger son or sons, shall, by the death or failure of issue male of the eldest or other elder son, become entitled to the said settled property of my said nephew Nathaniel, as the heir male of his body, then the limitations in this my will in favour of such second or other younger son, so becoming entitled, shall immediately after such event cease and become void, and the next younger son of my said nephew Nathaniel, and the heirs male of his body, shall, under the limitations of this my will, become entitled to my hereditaments and real estate aforesaid, in such manner in every respect as if his next elder brother, or the issue male of his body, had been dead or become extinct."

John (the testator of 1822) died in 1824, and his nephew Sotherton thereupon entered into possession of the Iridge estate under the last-mentioned will; and his nephew Nathaniel entered into possession of the estates devised by the will of 1797.

In April, 1826, Nathaniel (nephew of the testator of 1822) and his eldest son Colonel M. conveyed the lands in Surrey, Middlesex, and London to Jonathan George, in fee, conformably to the terms of the first shifting clause of the will of 1822; whereupon, by virtue of the provisions of the will, the devise of the Iridge estate in remainder to Jonathan George and his sons in tail male became void, and the devise of that estate in remainder to Nathaniel (the testator's nephew) and his sons took effect.

Nathaniel (nephew of the testator of 1822) died in 1856, having previously devised his Hickling and other estates, subject to a term of years for raising a sum of money, to his eldest son, Colonel M., for life, with remainder to his sons successively in tail male, with remainder, on failure of such issue, to his second son (the defendant), for life, with remainder to his sons successively in tail male, with a like remainder to his third son (the plaintiff), with remainders over.

Colonel M. (eldest son of Nathaniel, nephew of the testator of 1822) died in July, 1856, whereupon the defendant entered into possession of the H. and B. estates (the T. estate having long before been sold), and of the property devised by the will of 1797, with the exception of the estates in Surrey, Middlesex, and London, which had been conveyed to Jonathan George in 1826:—

Held, that the estates referred to in the (second) shifting clause were the estates which passed by the will of 1797, and which came to the defendant as first tenant in tail in remainder after the determination of the prior estate of his elder brother; that the character in which the defendant actually took the estates was intended to be described by the term "heir male of the body" of his father; and that, consequently, the contingency provided for by the shifting clause had happened, and so the plaintiff was entitled, as the next younger son of the testator's nephew Nathaniel, to the Iridge estate. *Micklethwait* v. *Micklethwait*, 790

DISTRICT-SURVEYOR.

Notice to,—See METROPOLITAN BUILDING ACT, 1.

DIVISION.

See VESTRY.

EVIDENCE.

Parol Evidence of the Contents of a Lost Document.

1. Where a written instrument has been lost, and parol evidence of its contents has been received, its construction is still for the court, and not for the jury. *Berwick* v. *Horsfall*, 450

Irrelevant to the Issue.

2. In an action for goods sold and delivered, the question being whether the sale was absolute or subject to a condition,—Held, that it was not competent to the defendant to call witnesses to prove that the plaintiff had made contracts with other persons subject to the condition suggested. *Hollingham* v. *Head*, 388
3. But the judge allowed the plaintiff to be asked, on cross-examination, whether he had not made such conditional contracts with others,—with a view of testing his credit or the accuracy of his memory. *Id.*
4. *Quære*, whether it was proper even to that extent? *Id.*

EXECUTORS AND ADMINISTRATORS.

Liability of Representatives of a Deceased Shareholder of a Joint Stock Bank.

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the executors of one whose name has since his decease been inserted in the last filed memorial or return (under the 7 & 8 Vict. c. 113, s. 16), are not liable to execution on a judgment against the company, although the testator was properly re-

turned as a shareholder in previous memorials. *Powis* v. *Butler*, 469. [The pages from 465 to 476 are accidentally repeated.]

EXPERIMENTS.

See LETTERS PATENT, 4.

FALSE IMPRISONMENT.

Evidence of.

The defendant, the owner of a beer-house, placed the plaintiff therein to carry on the business as his servant at weekly wages, with an agreement for a *month's* notice to determine the service. Having given him a *week's* notice, the defendant made up the account and required the plaintiff to pay him the balance; and, on the plaintiff's refusal to accede to this request, on the ground that he had not received the stipulated month's notice, the defendant brought in a superintendent and a serjeant of police, one of whom, on the plaintiff's attempting to go up stairs, refused to permit him to do so, and ultimately only allowed him to go accompanied by an officer. After some further altercation about the money, and the plaintiff's again refusing to hand it over at the request of the superintendent, the latter asked the defendant if he should take him: it did not appear what answer the defendant made, but the officer took the plaintiff into custody, and entered a charge of embezzlement against him at the station-house, and afterwards carried him before the magistrates, by whom he was discharged.

In an action in the county court for the false imprisonment, the judge told the jury that there were three questions for their consideration,—first, whether there was any imprisonment,—secondly, by whom it was committed,—thirdly, whether there was any legal ground for it. Upon the first point, he told them that "to constitute an imprisonment, it was not necessary that the person should be locked up within four walls, but that, if he was restrained in his freedom of action by another, that was an act of imprisonment, and that the way in which the plaintiff had been constrained *in his own house* and the restraint put upon his person by refusing him permission to leave the room and go up stairs *in his own house*, was in itself an imprisonment, independent of his being conveyed before a magistrate;" upon the second, "that, if they found the defendant was the moving party in causing the imprisonment, he was responsible for it;" and, upon the third, "that the plaintiff, *as tenant* or *as lawful occupier, under an agreement not then terminated*, of the premises, was not legally liable to be ejected by compulsion and without notice, and that, if he refused to leave the house, the defendant could only eject him by adopting the proper legal proceedings to obtain possession, and that there was no evidence whatever to support or justify the charge of embezzlement."

The jury having found for the plaintiff,—Held, upon an appeal, that, although the latter part of the summing-up (which seemed to assume that there was a tenancy or quasi tenancy) was somewhat inaccurate, it did not amount to a misdirection in point of law. *Warner*, app., *Riddiford*, resp., 180

FELONY.

See COMMON CARRIERS, 4, 5. RAILWAY COMPANY, 6, 7.

FIXTURES.

See LEASE, 1.

FOREIGN ATTACHMENT.

Effect of Notice.

Quære, whether a notice of attachment out of the Lord Mayor's Court, London, is any answer to an order under the garnishee clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. *Newman* v. *Rook*, 434

FOREIGN CORPORATION.

Service of Process upon,—See PRACTICE, 2.

FOREIGN RESIDENCE.

See INSURANCE, 1.

FORFEITURE.

See LEASE, 3.

FORGERY.

By erasing the Crossing of a Check,—See CHECK, 2.

[FRAUDULENT REPRESENTATION.

Action for.

B., the chairman of a mining company, by falsely representing to the Stock Exchange that two-thirds of the shares had been taken and paid upon, procured the stock to be entered in the official list. S., a stranger, knowing the rule, that such stock was not admitted into such list unless two-thirds of the capital had been paid up, and seeing the stock so entered, and relying on the insertion having been procured by honest means, bought some shares from a jobber on the Exchange:

Held (affirming the judgment of the Exchequer Chamber in accordance with the

ruling of Jervis, C. J.), that S. had a right of action against B. for the fraudulent representation, and there was evidence for the jury of fraud. *Bagshaw* v. *Seymour*, 873]

FREEHOLD INTEREST.

See TRUSTEES.

FUNERAL EXPENSES.

See ACCIDENTAL DEATH, 8.

GARNISHMENT.

See COMMON LAW PROCEDURE ACT, 1854, 2, 3, 4.

GUARANTEE.

See COVENANT, 1.

HARBOURS, DOCKS, AND PIERS CLAUSES ACT, 1847.

Construction of s. 63.

1. The 63d section of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), which imposes a penalty upon the master of any vessel who shall without the permission of the harbour-master moor the same in the entrance (or within the prescribed limits) of any dock or harbour, and who shall not remove the same upon notice, overrides and extinguishes all local and private rights of property therein. *Gardner*, app., *Whitford*, resp., 665
2. The assertion of such local or private rights does not exclude the jurisdiction of the justices under the act. *Id.*

HIRING.

See MASTER AND SERVANT, 1, 2.

IMMATERIAL ISSUE.

See NUISANCE, 2.

INJUNCTION.

Under the Railway Traffic Act, 1854,—*See* RAILWAY COMPANY, 8–15.

INSURANCE.

Consolidating Actions,—*See* PRACTICE, 6.

Life Assurance.

1. *Construction of condition.*]—On the 23d of June, 1853, the plaintiffs (in Glasgow) effected a policy for 2000*l.* upon the life of A., one of the conditions of the insurance being that the policy should be void if A. should go beyond the limits of Europe without leave of the directors. The premiums were regularly paid each half-year down to the 22d of December, 1857.

One of the plaintiffs, who was the agent at Glasgow of the company, in the confidential report made to them on the 18th of June, 1853, stated,—"A. has for sixteen years past resided principally at Belize, Honduras: his health has not in any way suffered: *he intends returning there for a few years in about a month*:" and on the 20th he wrote to them, "*A. proceeds to Belize about the end of this month.*"

On the back of the policy, and of even date therewith, was the following memorandum: —"The life assured under this policy being about to proceed to and reside at Belize, in the state of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid along with the premium payable on this policy as within expressed."

The extra premium for one year's foreign residence was paid on the 23d of June, 1853, but A. did not in fact proceed to Belize until the 9th of June, 1856, arriving there "about the middle or latter end of August." He died there on the 13th of August, 1857, within a year of his arrival at Belize:—

Held, that the permission to reside "for one year" at Belize, was not limited to any particular year, and consequently that the assured were entitled to recover the sum insured. *Notman* v. *The Anchor Assurance Company*, 464

2. *Covenant to keep on foot a policy assigned. Measure of damages.*]—The defendant by deed of mortgage, reciting a loan of 12,500*l.* by the plaintiffs to the defendant upon the security of a demise of the defendant's life interest in certain property and a conveyance of a reversion in fee, and also by a policy for 13,000*l.* in the Norwich Union Life Assurance Office, payable within three months after the death of the defendant "in case he should leave issue male by his then present wife living at his death,"—the defendant covenanted that he would "from time to time during his natural life, and so long as the said sum of 12,500*l.*, or any part thereof, or any interest for the same, should remain due and owing on the said security, continue and keep on foot the benefit of the said recited policy of assurance, and pay or cause to be paid the yearly and other premiums, &c., and would not permit or suffer or do any act whereby the said policy might be forfeited or vacated," &c. The deed also contained a proviso, that, in case the defendant should neglect to pay the premiums, it should be lawful for the plaintiffs to pay the same, and to charge the payments so made upon the hereditaments thereby

charged. The deed contained no covenant by the defendant to repay the plaintiffs the sums they might pay to keep the policy alive.

The defendant paid the interest and premiums regularly down to the year 1848, but since that time (there being then no possibility of his having any issue by his then wife) he had discontinued to pay the premiums. The annual premiums accruing up to the present time were placed to the credit of the office in an account kept by them, called their "Policy Premium Account," and regularly debited year by year by the office to the mortgage account of the defendant, according to the practice of the office,—but the defendant had no notice of this course of dealing.

The plaintiffs having brought an action against the defendant upon his covenant for payment of the premiums, the defendant pleaded payment of 1*s.* into court.

Upon a special case stating these facts:—Held, that, assuming the plaintiffs to have *paid* the premiums, they were not entitled to more than nominal damages. *Brown* v. *Sir Robert Price*, 598

3. But, *semble*, that the course of dealing stated did not amount to evidence that they had paid them. *Id.*

JOINT STOCK BANK.

Execution against Executors of a Deceased Shareholder.

1. Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the executors of one whose name has since his decease been inserted in the last filed memorial or return (under the 7 & 8 Vict. c. 113, s. 16), are not liable to execution on a judgment against the company, although the testator was properly returned as a shareholder in previous memorials. *Powis* v. *Butler*, 469

JOINT STOCK COMPANY.

Action for Calls.

2. It is not competent to a shareholder in a completely registered joint stock company, who has executed the deed of settlement, with a recital therein that the whole number of shares have not been subscribed for, to defend himself against a claim for calls, on the ground that the directors have proceeded to carry on business with less than the stipulated amount of capital subscribed. *The London and Continental Assurance Society* v. *Redgrave*, 524

JUS TERTII.

See COMMON CARRIERS, 3.

JUSTICES.

Jurisdiction of, under 1 & 2 *Vict. c.* 74.

1. *Title in question.*]—Upon an application (under the 1 & 2 Vict. c. 74) by a landlord to justices in petty sessions, to recover possession of premises held over by his tenant after the expiration of the term, the tenancy having been proved to the satisfaction of the justices, and its legal determination, and the tenant's refusal to quit,—Held, that the jurisdiction of the justices to give the landlord possession, was not ousted by the tenant's setting up the title of the third person. *Rees*, app., *Davies*, resp., 56

Appeal from Decisions of, under 20 & 21 *Vict. c.* 43.

2. *Time for application for a case.*]—Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior courts under the 20 & 21 Vict. c. 43, s. 2, although it be the last day. *Peacock*, app., *The Queen*, resp., 264

3. *Amendment of case.*]—An application to send back for amendment a case on appeal from justices under the 20 & 21 Vict. c. 43, s. 2, may be entertained before the day of argument. *The Yorkshire Tire and Axle Company*, app., *The Rotherham Local Board of Health*, resp., 362

4. *Right to begin.*]—Upon appeals under the 19 & 20 Vict. c. 43, the appellant begins in this court, though it is otherwise in the Queen's Bench and Exchequer. *Gardner*, app., *Whitford*, resp., 665

LANDLORD AND TENANT.

See LEASE. METROPOLITAN BUILDING ACT.

LAND-TAX.

Evidence of Redemption of,—*See* SALE, 1.

LEASE.

Construction of.

1. *Tenant's right to fixtures.*]—By a lease, the lessee covenanted to erect a steam-engine, machinery, and buildings proper for carrying on the business of a shipwright, on the land demised, and to leave the same for the lessors at the expiration or other sooner determination of the term,—"it being by the said indenture declared that all steam and other engines, machinery, &c., set up upon the premises at any time during the term for the purpose of carrying on the trade of a shipwright, together with all fixtures, should not be removed therefrom, but should, upon the expiration or other sooner determination of the said term, belong to the landlords and not to the tenant, without any payment being

made to him for the same." The lease then went on to provide "that the last-mentioned stipulation should not be construed to apply to any machinery or other articles which might be erected or set up on the demised premises by the lessee during the term, for any other purpose than that of carrying on the business of a shipwright; but that it should be lawful for the lessee at any time during the term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, &c., from the said demised premises." The lease then contained a further proviso, that, in the event of the lessee becoming bankrupt, it should be lawful for the lessors to re-enter, "and upon such entry to take possession of, have, &c., as their own property, without paying anything for the same, all steam and other engines, &c., which should be found on the premises, and which should be used or employed in or about the business of a ship-builder thereon." The lessee having become bankrupt, the lessors re-entered for the forfeiture:—Held, that the assignees of the lessee were entitled to enter for the purpose of removing the fixtures other than those set up for the ship-building business, and to a reasonable time for that purpose. *Stanfield* v. *The Mayor, &c. of Portsmouth*, 120

Covenant to Repair.

2. A general covenant to repair, and further to repair, within three months after notice from the lessor, are separate and independent covenants; and a right of re-entry attaches for a breach of the former, though no notice be given under the latter. *Baylis* v. *Le Gros*, 537

Re-entry for a Forfeiture.

3. A lessor, finding the demised premises out of repair, intending to take advantage of a clause of forfeiture contained in the lease, entered into an agreement with an undertenant whom he found there to let them to him as a yearly tenant, and subsequently received rent from him:—Held, a sufficient re-entry to avoid the lease. *Baylis* v. *Le Gros*, 537

LETTERS PATENT.

Construction of Specification.

1. *Provisional specification.*]—The office of the provisional specification, under the 6th section of the 15 & 16 Vict. c. 83, is, only to describe generally and fairly the *nature* of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out, as in the complete specification under s. 9. *In re Newall and Elliot*, 269

2. A. was the inventor of "improvements in apparatus employed in laying down submarine electric telegraph wires." In the provisional specification filed pursuant to the 6th section of the 15 & 16 Vict. c. 83, the invention was thus described,—"The cable or rope containing the insulated wire or wires is passed round a cone, so that the cable in being drawn off the coil is prevented from kinking by means of the cone, and there is a cylinder on the outside which prevents the coil from shifting in its place." In the complete specification, after describing the invention in the same terms, the inventor proceeded to say,—"When the wire or cable is to be laid down, I place over the cone an apex or top which is conoidal or conical, and *around this I suspend several rings of iron or other metal by means of cords, so as to admit of adjustment at various heights over the cone. The use of these rings is, to prevent the bight of the rope from flying out when going at a rapid speed, and the combination of these parts of the apparatus prevents the wire or cable from running into kinks:*" and the claim at the end was thus,—"What I claim as my invention is,—first, coiling the wire or cable round a cone,—second, the supports placed cylindrically outside the coil round the cone,—third, *the use of rings in combination with the cone as described:*"—Held, that the validity of the patent was not affected by the omission of all mention of the metal rings in the provisional specification. *In re Newall and Elliot*, 269

Evidence of Infringement.

3. And held, that the substitution by B. of a *cylinder* having a domed or hemispherical top, for the cone or the cone with the conoidal apex in A.'s apparatus,—A.'s apparatus and B.'s being used for the same purpose, and in nearly the same manner,—was evidence, and strong evidence, of infringement. *Id.*

Publication.

4. *Experiments.*]—A necessary and unavoidable disclosure of the invention to others, if made in the course of mere experiments, is not such a publication as will avoid the subsequent grant of a patent,—though the same disclosure, if made in the course of a profitable use of an invention *previously ascertained to be useful*, would be a publication: but an experiment performed in the presence of others, which not only turns out to be successful, but actually beneficial in the particular instance, is not necessarily a publication, so as to constitute a gift of the invention to the world. *Id.*

5. A. had invented an improved apparatus for laying down submarine telegraph wires; and, after some unsatisfactory and indecisive experiments at the works on shore, having entered into a contract with government for

laying down a telegraphic cable in the Black Sea (the mode of doing it being left to his discretion), fitted a vessel with his improved apparatus, and used it successfully on that occasion, and immediately afterwards took out a patent for the invention:—Held, that what was done in the Black Sea, having been done merely by way of experiment, though productive of profit to A., did not amount to a publication, so as to preclude him from afterwards obtaining the protection of a patent for his invention. *In re Newall and Elliot,* 269

LIFE ASSURANCE.

See INSURANCE.

LIQUIDATED DAMAGES.

See PLEADING, 2.

LORD MAYOR'S COURT.

See FOREIGN ATTACHMENT.

MAGISTRATES.

See JUSTICES.

MASTER AND SERVANT.

Special Custom for Determination of a Yearly Hiring.

1. An agreement was entered into between the plaintiff and the defendant in the following terms:—"A. engages to serve B. as agent or representative, at the salary of 150*l.* per annum: Also provided at the end of the year B. find A. has done sufficient business to justify him in recompensing by making up his salary to 180*l.*, to do so, being a donation of 30*l.* to his present stipulated amount of 150*l.*"

   It being proved at the trial, that, by a general custom of the trade, a yearly hiring is determinable by a month's notice at any time:—Held, that there was nothing in the proviso to exclude the application of the custom to the particular case. *Parker* v. *Ibbetson,* 346

2. In an action upon the above agreement, charging a wrongful dismissal within the year, the judge left it to the jury to say whether the proviso was meant by the parties to exclude the custom:—Held, a misdirection; there being no ambiguity in the contract, and its construction being for the court. *Id.*

MAYOR'S COURT.

See FOREIGN ATTACHMENT.

MEASURE OF DAMAGES.

See DAMAGES.

MEMORANDA.

Serjeants.

Charles Petersdorff,	475
John Cross,	*Id.*
John Tozer,	*Id.*
William Payne,	*Id.*

METROPOLIS LOCAL MANAGEMENT ACT.

"Regular Line of Buildings."

1. By the 143d section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, after the 1st of January, 1856, no building is to be erected beyond "the regular line of buildings in the street in which the same is situate:"—Held, that this does not mean a strict mathematical line, but a substantially regular line. *Tear* v. *Freebody,* 228

Proceedings of the Vestry.

2. By the 28th section of the 18 & 19 Vict. c. 120, the duties of vestries are to be performed by the majority present. By a by-law made pursuant to the 202d section, it was provided that "all questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded:"—Held, that the division or poll might take place after a show of hands. *Tear* v. *Freebody,* 228

METROPOLITAN BUILDING ACT.

Construction of 18 & 19 *Vict.* c. 122.

1. A landlord is justified, under the 83d section of the Metropolitan Building Act, 18 & 19 Vict. c. 122, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and other premises belonging to him, without giving the notice required by s. 85,—such tenant not being an "owner" within the interpretation clause, s. 3: and it is no objection that he has neglected to give the notice to the district surveyor required by s. 38. *Wheeler* v. *Gray,* 584

2. *Semble,* that the landlord would (if necessary), under such circumstances, be a "person" entitled to notice of action under s. 108. *Id.*

MINE.

See COST-BOOK MINE.

MISDIRECTION.

1. An agreement was entered into between the plaintiff and the defendant in the following terms:—"A. engages to serve B. as agent or representative, at the salary of 150*l.* per annum: Also provided at the end of the year B. find A. has done sufficient business to justify him in recompensing by making up his

salary to 180*l.*, to do so, being a donation of 30*l.* to his present stipulated amount of 150*l.*" In an action upon the above agreement, charging a wrongful dismissal within the year, the judge left it to the jury to say whether the proviso was meant by the parties to exclude the custom:—Held, a misdirection; there being no ambiguity in the contract, and its construction being for the court. *Parker* v. *Ibbetson*, 346

2. In an action for a nuisance arising from the burning of bricks on the defendant's own land near to the plaintiff's dwelling-house, the judge told the jury that "no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its being so carried on;" and he left to them two questions,—first, "was the place in which the bricks were burned a proper and convenient place for the purpose,"—secondly, if they thought the place was not a proper place for the purpose, then, was the nuisance such as to make the enjoyment of life and property uncomfortable:—Held, no misdirection. *Hole* v. *Barlow*, 334

MOURNING.

See ACCIDENTAL DEATH, 3.

NECESSARIES.

See SHIPPING.

NEGLIGENCE.

See ACCIDENTAL DEATH.

NOTICE OF ACTION.

For a Thing done under a Statute,—See METROPOLITAN BUILDING ACT, 2.

NUISANCE.

Obstruction upon a Private Way.

1. The owner of land having a private road for the use of persons coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission, by placing a quantity of slates there in such a manner that the plaintiff in using the road sustained damage:—Held, that A. was liable to an action. *Corby* v. *Hill*, 556

2. Held also that the declaration was not objectionable for not averring that the obstruction was placed on the road without permission; inasmuch as such an allegation, if traversed, would have presented an immaterial issue. *Id.*

Brick-burning.

3. In an action for a nuisance arising from the burning of bricks on the defendant's own land near to the plaintiff's dwelling-house, the judge told the jury that "no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its being so carried on;" and he left to them two questions,—first, "was the place in which the bricks were burned a proper and convenient place for the purpose,"—secondly, if they thought the place was not a proper place for the purpose, then, was the nuisance such as to make the enjoyment of life and property uncomfortable:—Held, no misdirection. *Hole* v. *Barlow*, 334

OLD BUILDING.

See BUILDING.

OWNER.

See METROPOLITAN BUILDING ACT, 1.

PARTY-WALL.

See METROPOLITAN BUILDING ACT, 1.

PASSENGERS' LUGGAGE.

See RAILWAY COMPANY, 3–7.

PAYMENT.

Evidence of,—See INSURANCE, 3.

PENALTY.

See PLEADING, 2.

PLEADING.

Statement of Consideration for Defendant's Promise.

1. The declaration stated, that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange (describing them), and to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised the plaintiff, that, if he should succeed in procuring the bills or either of them to be discounted, he would apply the proceeds in a given way: averment that the defendant did succeed in procuring the bills to be discounted, but that he failed to apply the proceeds as agreed:—Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration for the defendant's promise. *Hart* v. *Miles*, 371

Plea to Damages.

2. The declaration stated, that, by a memorandum of agreement made between the plaintiff of the one part and the defendant of the other part, *it was witnessed*, that, in consideration, &c., the defendant agreed to become and be for five years assistant to the plaintiff in his art and profession of photographic colourer or painter, and would during the term give up his whole time and attention to superintending the same, in retouching and perfecting all such portraits, &c., as should be coloured or painted by the plaintiff in the prosecution of his said art or profession, and as the plaintiff should from time to time require,—that the defendant would not at any time during the term take employment from any other person, or be otherwise engaged in colouring, &c., any photographic portrait, &c.,—that the defendant would during the term do and perform all such acts, &c., in or relating to the said art or profession as the plaintiff should direct, and would not reveal any secret relating thereto,—and that the defendant would be just and faithful in his dealings, &c.: that *it was thereby further witnessed*, that, for and in consideration of the agreement on the defendant's part, the plaintiff thereby agreed to pay the defendant weekly a certain specified remuneration for every portrait, &c., which he should retouch to the plaintiff's satisfaction, and to guaranty that the defendant should be continually supplied with photographic portraits to be retouched, &c.: and that, *lastly, it was thereby mutually agreed and declared by and between the plaintiff and the defendant, that they should respectively forfeit the sum of 500l., to be paid to the other of them as liquidated damages, in the case of any breach being made by either of them in the true performance of the terms and conditions of the said agreement.* After averring performance by the plaintiff of all things necessary to entitle him to have the agreement performed by the defendant, the declaration alleged for breaches,—that the defendant did not continue the assistant of the plaintiff for the stipulated period, nor give the whole of his time in retouching portraits, &c., as required,—that, during that period, he took employment from other persons,—that he refused to perform certain acts in and relating to the said art or profession as the plaintiff required, and divulged secrets, &c.,—and that the defendant did not nor would during the term be just and faithful in his dealings, &c.; and it concluded as follows: "by reason of which said several premises the defendant forfeited and became liable under and by virtue of the agreement to pay to the plaintiff the said sum of 500*l.*, *as liquidated damages*, but the defendant has not paid the same, or any part thereof, and the plaintiff claims 500*l.*"

The defendant pleaded, "to the plaintiff's claim of 500*l.* as and for liquidated damages," that the said memorandum of agreement was and is in the words and figures following (setting it out); averment, that the 500*l.* in the agreement mentioned was a *penalty*, and not *liquidated damages*, and that the defendant was not liable to pay to the plaintiff the said sum of 500*l.* as and for liquidated damages, in manner and form as in the declaration alleged:—

Held, on demurrer (dubitante Willes, J.), that the concluding averment in the declaration that the defendant became liable to pay the 500*l.* *as liquidated damages*, but had not paid the same, was a mere erroneous allegation of an inference of law, and immaterial, it being sufficiently apparent on the declaration that the 500*l.* was a penalty, and not *liquidated damages*, and that the plea was bad, as being a mere plea to damages. *Reindel* v. *Schell*, 97

Immaterial Issue,—See NUISANCE, 2.

POLL.

See VESTRY.

PRACTICE.

Process.

1. *Service on one of two partners.*]—To entitle a plaintiff to an order to dispense with personal service of a writ of summons upon one of two defendants, members of a firm sued as acceptors of a bill of exchange, it is not enough to show that he has gone abroad, and has no private residence here: the affidavit must show upon the face of it reasonable grounds for inducing the court to conclude that he is evading service of the writ. *Kitchin* v. *Wilson*, 483

2. *Service upon a foreign corporation.*]—The 16th, 18th, and 19th sections of the Common Law Procedure Act, 1852, do not apply to the case of proceedings against a foreign corporation carrying on business abroad. *Ingate* v. *La Commissione del Lloyd Austriaco*, 704

3. *Setting aside a judgment on a specially endorsed writ.*]—Where judgment has been signed (for default of appearance) upon a writ specially endorsed under the 25th section of the Common Law Procedure Act, 1852,—the affidavit in support of an application by the defendant to be let in to defend, under the proviso in s. 27, must not merely state that he has "a defence upon the merits," but must *disclose* or *make known* the nature of such defence, in order that the judge may see that it

really amounts to a defence. *Whiley* v. *Whiley*, 653

Appeal from a Judge at Chambers.

4. An appeal from a decision of a judge at chambers will not be entertained after the lapse of a term. *Craske* v. *Smith*, 446

5. The plaintiff recovered 40*s.* only in an action under Lord Campbell's Act; and the judge on the 21st of August refused to grant a certificate under the 13 & 14 Vict. c. 61, s. 12, that the cause was proper to be tried in the superior court. In the following Michaelmas Term, the plaintiff applied by summons for costs under the 15 & 16 Vict. c. 54, s. 4, and the judge endorsed thereon "no order." An application to the same effect was made to the court in Hilary Term:—Held, that this was in effect *an appeal against the decision of the 21st of August*, and therefore that the motion was too late. *Id.*

Staying Proceedings,—See ARBITRAMENT.

Consolidation Rule.

6. Actions having been brought against eight several defendants upon mutual insurance policies, the court, at the instance of the defendants, granted a rule for consolidating them,—upon the terms that the several defendants should admit the *amounts* for which they were respectively liable, in case their liability should be established, and should consent, if necessary, to an order referring it to the master to settle the same. *Lewis* v. *Barkes*, *Lewis* v. *Blagdon*, 330

Postponing Trial.

7. *Absence of witness.*]—The court will not, at the instance of a defendant, postpone the trial of a cause, on the ground of the absence of a material and necessary witness, where the witness is a captain in the service of the defendant, and the defendant has been guilty of laches in abstaining from securing the testimony of the witness when within his power. *Wright* v. *M'Guffie*, 441

PRINCIPAL AND AGENT.

Dealing with Agent as Principal, at the request of the real Principal.

1. To a declaration for money paid, money received, &c., the defendants pleaded that they at the request and with the consent of the plaintiffs dealt with and treated one F. as the principal in the transaction in respect of which the moneys were received by the defendants, and as the party with whom alone they were dealing; that the plaintiffs further authorized and requested the defendants to receive any moneys resulting from the transaction on account of and as the moneys of F., and on the terms that the defendants might deal with such moneys as the moneys of F.: Averment, that the moneys, being the moneys resulting from the said transaction, were afterwards, in pursuance of the said request, authority, and consent of the plaintiffs, received by the defendants in respect of and as the result of the said transaction, and on account of and as the moneys of F.; that, upon the faith and in consequence of the said request, authority, and consent of the plaintiffs, the defendants afterwards gave credit to F. in respect of divers other transactions, and were induced to allow F. to incur debts to them which were still due; and that, before and at the time when the said moneys were so received by the defendants as aforesaid, on account of and as the moneys of F., he the said F. was, and still remained, indebted to the defendants for and in respect of the debts thereinbefore mentioned, in an amount equal to the plaintiffs' claim,—which amount the defendants were willing to set off:—Held, bad, on demurrer. *Farrand* v. *Bischoffsheim*, 710

Ratification of Act of Agent.

2. A., professing to act as the agent of B., the owner of a vessel in the African trade, under a power of attorney, during the voyage removed C. (the master) from the command, for alleged misconduct. At the termination of the voyage, the master (who had been permitted to remain on board) sued the owner *for wages:—Quære*, whether the act of A. in removing C. from the command of the vessel, was one which could be ratified by B. after the voyage was over? *Berwick* v. *Horsfall*, 450

PRIVATE WAY.

Obstruction of,—See NUISANCE, 1.

PROCESS.

See PRACTICE, 1, 2, 3.

PROHIBITION.

See COUNTY COURT, 4—6.

PROMOTIONS.

See MEMORANDA.

PROVISIONAL SPECIFICATION.

See LETTERS PATENT, 1.

PUBLIC HEALTH ACT.

Contracts by a Local Board, under 11 & 12 *Vict.* c. 63, *s.* 85.

By the 85th section of the Public Health Act, 11 & 12 Vict. c. 63, it is, amongst other things, enacted that "the local board of

health may enter into all such contracts as may be necessary for carrying the act into execution; and every such contract, whereof the value or amount shall exceed 10*l.*, shall be in writing, *and sealed with the seal of the local board,*" &c.:—Held, that a contract which did not comply with this condition is not capable of being enforced. *Frend* v. *Dennett*, 576

PUBLICATION.

See LETTERS PATENT, 4, 5.

RAILWAY COMPANY.

Action against, for Negligence.

1. The first count of the decaration stated that the defendants were the owners and occupiers of a railway, and of a station thereon for the loading, unloading, &c., of cattle carried thereby and of a yard adjoining the station and railway, into and through which yard cattle brought by the railway to the station were used and accustomed and were obliged to pass in going from the station to a certain common highway near thereto; and that the defendants by reason of the premises ought to have made and maintained good and sufficient fences between the said yard and the railway, so as to prevent cattle lawfully being in the yard from straying thereout into and upon the railway; but that they omitted to make and maintain such fences, whereby a bull of the plaintiff, lawfully being in the yard, on his way to the highway, without default or negligence on his part, strayed from the yard on to the railway, and was killed by a passing train:—Held, that there was no liability upon the company, either by the common law or by the statute 8 & 9 Vict. c. 20, s. 68, to fence their yard from the railway, and consequently that the count disclosed no cause of action. *Roberts* v. *The Great Western Railway Company*, 506

2. The second count alleged that a certain bull of the plaintiff was lawfully in a close adjoining a railway of which the defendants were owners and occupiers, and along which railway they had not made any fences for preventing cattle being in the close from straying thereout upon the railway, and that, whilst the bull was lawfully in the close, the defendants and their servants, negligently and wrongfully, chased, startled, and frightened the bull, and so caused it to run upon the railway, where it was killed. At the trial, it appeared that the bull, with other cattle which had been brought by the railway, being in the station yard, a place unlighted and not fenced from the railway, a porter came out of the office with a lantern such as were ordinarily used by porters in his hand, and that the light startled some of the beasts, and caused the plaintiff's bull to run upon the line, where it was knocked down and killed by a passing train:—Held, no evidence for the jury that the company's servants had been guilty of negligence. *Roberts* v. *The Great Western Railway Company*, 506

Liability of, for loss of Passengers' Luggage.

3. By a railway act it was enacted, "that, without extra charge, it should be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing, not exceeding 40 lbs. in weight and four cubic feet in dimensions; and that the said company should in no case be in any way liable or responsible for the safe carriage or custody of, or for any loss of or injury to any articles, matters, or things whatsoever carried upon or along the said railway with or accompanying the person of or belonging to any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing not exceeding the weight and dimensions aforesaid."

Pursuant to the powers conferred upon them by the act, the company made certain rules and regulations as to passengers' luggage; amongst others, one requiring it to be labelled, and declaring that they would not be responsible for the loss or detention of articles not labelled and properly addressed,—and another declaring that all unclaimed property found on their premises or in their carriages should be deposited in a place called the lost property office, and restored to the owner on payment of a fee of 6*d.* for each article. In addition to these regulations, the company gave private instructions to their servants, to the effect that "no small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, nor bundles of rugs, coats, and wrappers strapped together, are to be labelled or placed in the luggage-van: the passengers must take charge of such articles themselves, or send them as booked parcels."

The plaintiff, a passenger upon the railway, required one of the company's porters to label and place in the luggage-van a package (within the stipulated weight and dimensions) consisting of articles of wearing apparel, and wrapped in a shawl fastened with a strap, and properly addressed. The porter refused to label the package, and insisted upon placing it in the carriage with the plaintiff. The plaintiff declined to allow this, unless it was to be at the company's risk. The package was left behind, and was afterwards taken to the lost property office, where it was detained, and 6*d.* demanded for its restoration:—

Held, that the company were not justified in refusing to carry the package at their own

risk, and were responsible for its detention. *Munster* v. *The South Eastern Railway Company*, 676

4. *Semble*, that, if the company had been justified in refusing to carry the parcel, they might have been justified in taking it to the lost property office. *Id.*

5. *Bailment.*]—A box containing goods, some of which were the property of A., and some the property of B., was delivered on their behalf by a third person at a railway station, to be carried from Worthing to London. The box was addressed to A., and was received by him in London, and he paid the carriage:—Held, that there was evidence of a joint bailment in respect of which a joint action might be brought by A. and B. for the loss of the goods. *Metcalfe* v. *The London, Brighton, and South Coast Railway Company*, 317

6. *Loss by felonious acts of servants.*]—In an action against a common carrier for the loss of a parcel, a replication that the loss arose from the felonious acts of the defendants' servants is a good answer to a plea founded upon the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, s. 1, that the value exceeded 10*l.*, and was not declared at the time of delivery to the carrier. *Metcalfe* v. *The London, Brighton, and South Coast Railway Company*, 307

7. *Evidence of Felony.*]—In an action against a railway company, as common carriers, for the loss of goods, the defendants pleaded a plea founded upon the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, s. 1, that the value of the goods exceeded 10*l.*, and was not declared at the time of the delivery to them; to which plea the plaintiffs replied that the loss arose from the felonious acts of servants of the company. It was proved that the goods in respect of which the action was brought consisted of articles of jewelry, &c., contained in a tin box, which was enclosed in a deal box fastened with a padlock; that the box was brought to the company's station at Worthing, by a servant of a person in whose house the plaintiffs had lodged, to be forwarded to the plaintiffs in London; and that, when the box was delivered to the plaintiffs there by a porter of the company, it was found that the outer box had been opened, and the tin box and its contents abstracted from it:—Held, no evidence for the jury of a felony by the company's servants. *Metcalfe* v. *The London, Brighton, and South Coast Railway Company*, 311

Injunction against, under the Railway Traffic Act, 1854.

8. A railway company were empowered by the 175th section of their act of incorporation (6 & 7 W. 4, c. cvi.) to charge certain tonnage-rates or tolls for all articles, matters, and things carried or conveyed along the line, and (by ss. 177 and 179) to provide locomotive or other power for the carriage and conveyance of passengers, cattle, goods, &c., and to make reasonable charges for such carriage and conveyance, in addition to the tonnage-rates.

By s. 182, it was provided that the company might "from time to time make such orders for fixing, and by such orders fix, the sum to be charged by them in respect of *small parcels*, not exceeding 1 cwt. each, as to them should seem proper."

And by s. 186, it was further provided that "the aforesaid rates and tolls to be taken by virtue of the act should at all times be charged *equally* and *after the same rate per ton* throughout the whole of the said railway, in respect of the same description of articles, matters, or things," and that "no reduction or advance in the said rates and tolls should either directly or indirectly be made partially or in favour of or against any particular person or company."

Under the powers given to them by s. 182, the company framed a scale of charges for the carriage of parcels not exceeding 1 cwt. each, which charges were higher than the tonnage-rates warranted by s. 175, but which included a reasonable charge for the use of their carriages and locomotive power under ss. 177 and 179. Under this scale, where a number of *separate parcels* (each weighing less than 1 cwt., but exceeding 1 cwt. if taken in the aggregate) were brought to the railway by the same person, and containing the same article, and *all directed to the same person* at their place of destination, the company charged the tonnage or lower rate allowed by s. 175: but, if similar parcels were brought *addressed to several different persons*, they were charged the higher or parcels rate.

Upon a special case setting out these facts,—Held, that there was nothing to induce the court (or which ought to induce a jury) to infer that the charges so made were unreasonable, regard being had to the additional trouble incurred by the company. *Baxendale* v. *The Eastern Counties Railway Company*, 63

9. *Quære*, whether the 186th section applies to "small parcels?" *Semble*, per Byles, J., that it does. *Id.*

10. Though limited to a *reasonable* charge, there is no common-law obligation on a carrier to charge *equal* rates of carriage to all his customers. *Id.*

11. The Railway Traffic Act, 17 & 18 Vict. c. 31, does not interfere with the right of a party aggrieved by overcharges, to maintain an action to recover back the sums paid in excess. *Id.*

12. A railway company established a system of carrying coals according to assigned districts, comprising certain places on their lines and branches, carrying them within those several districts at certain lower rates for quantities not less than a "train-load" of 200 tons. The complainants, who were coal-dealers at Ipswich, also carried on that business at N., S., E., T., and B., which are places on that branch of the company's lines which conducts to Peterborough, and also at M. and D., which are on another branch line communicating with that first mentioned, and also at H., which is on another distinct branch. These districts were so adjusted that the places where the complainants dealt were distributed into three of them, so that, in order to take advantage of the reduced rates, the complainants would have to send from Ipswich three full "train-loads," which was a larger quantity than they could profitably send to those districts; and thus they sustained great injury: whereas, the rival dealers at Peterborough, by reason of one of the assigned districts embracing *seven* of those places at which the complainants dealt, were enabled to send their coals in such quantities as to avail themselves of the reduction. It being sworn, on the part of the company, that these districts were adjusted, not with a view to give an undue preference to the one set of dealers over the other, but solely with regard to their own convenience, and the wants of the neighbourhood:—Held, that the complaint was not sustained. *In re Ransome and the Eastern Counties Railway Company,* 135

13. The company made a scale of charges for the carriage of coals from Peterborough and Ipswich respectively to various places, the effect of which was to diminish the natural advantages which the Ipswich dealers possessed over those of Peterborough, from their greater proximity to those places, by annihilating (in point of expense of carriage) in favour of the latter a certain portion of the distance between Peterborough and those places:—Held, an undue preference to the Peterborough dealers over those of Ipswich. *Id.*

14. The South Western Railway Company had been in the habit of unloading goods coming by their railway from the Southampton Docks consigned to carriers in London, out of their trucks, and of placing them (by their servants) in or conveniently near to the wagons of the consignees without any extra charge. This practice they discontinued, refusing to allow their servants to unload the trucks without an extra charge for such service,—except in the case of Messrs. Pickford, whose goods they continued to unload as before, the smallness of their quantity, and the fact of their being carried intermixed with the company's own traffic, rendering it (as the company alleged) more convenient to themselves so to do. C., however, another carrier, was denied the aid of the company's servants in the unloading of his goods of the same description, and coming from the same place,—the company alleging that the same reasons did not apply to his goods as to Messrs. Pickford's, inasmuch as the former came in large quantities, and in separate trucks.

The court refused to make absolute a rule for an injunction under the Railway Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining the company to unload the trucks containing C.'s goods, and to deliver such goods to C. by placing the same in or adjoining to his wagons,—holding the demand to be too large. But they intimated, that, if C.'s complaint had been confined to the company's giving an advantage to Messrs. Pickford in the unloading of their goods, which they withheld from him, C. might have been entitled to relief under the statute. *In re Cooper and The London and South Western Railway Company,* 738

15. *Attachment for disobedience of injunction.*]—The court refused to grant an attachment against a railway company for disobedience to a writ of injunction under the 17 & 18 Vict. c. 31, enjoining them to desist from giving an undue preference, in respect of the carriage of coals, to persons carrying coals from P. or other places to or towards certain places mentioned in the rule,—the affidavits on the part of the company showing a bonâ fide endeavour on their part to conform to the order of the court,—although it appeared that the reformed scale of charges still operated in some other respects injuriously to the interests of the complainants, and advantageously to the other parties. *In re Ransome and The Eastern Counties Railway Company,* 159

RAILWAY TRAFFIC ACT.

See RAILWAY COMPANY, 8—15.

RE-ENTRY.

See LEASE.

Waiver of Right of.

A right of re-entry for breach of a covenant in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach, with knowledge of its existence. *Dendy* v. *Nicholl,* 376

REGULAR LINE OF BUILDINGS.

See METROPOLIS LOCAL MANAGEMENT ACT, 1.

RELEASE.

Covenant not to sue one of Several Debtors.

To an action for goods sold and delivered, the defendant pleaded that the causes of action accrued to the plaintiffs against the defendant and A., B., and C., *jointly, and not otherwise*, and not separately against the defendant, and that the defendant and A., B., and C. were *jointly liable* to the plaintiffs in respect of the causes of action in the declaration, *and not otherwise;* and that, after the accruing of the causes of action, and before suit, the plaintiffs by deed released A., B., and C. from the said causes of action, &c.

Replication, that the deed in the plea mentioned was a deed of assignment by A., B., and C., of their estate and effects for the benefit of their creditors, and contained words purporting, if considered without reference to any other part of the deed, to release as in the plea pleaded, but that, in another and earlier part of the same deed, it was agreed and declared in the words following, that is to say, "that it shall be lawful for the creditors to execute these presents without prejudice to any mortgage, lien, or security which they may have for their respective debts, or any part thereof, or to any claim against any surety or sureties or any other person or persons who may be liable for the payment thereof;" and that all the creditors who executed the deed, executed the same without prejudice as aforesaid; and so the plaintiffs said that the defendant was not released as in and by the plea supposed:—

Held, on demurrer, that, taking the plea and replication together, the deed appeared to amount only to a covenant not to sue A., B., and C., and not to a release; and, consequently, that the liability of the defendant,—whether joint only, or joint and several,—was not thereby discharged. *Willis* v. *De Castro*, 216

REPAIRS.

See LEASE, 2.

RETRACTATION.

See CONTRACT, 3.

RIGHT TO BEGIN.

See JUSTICES, 4.

SALE.

Of Lands.

1. *Conditions of sale.*]—By the particulars on a sale by auction of freehold land, the property was described as "land-tax redeemed." The only evidence of that fact, was, a statement in the witnessing part of a conveyance (dated in 1844,—*twelve years* before the date of the sale) from one Mears to one Humphreys (from whom the property came by various mesne assignments to the vendor), in which the then vendor acknowledged to have received the amount of the purchase-money for the purchase of the premises "and the fee-simple and inheritance thereof in possession, *free from land-tax* and all other encumbrances," and a statutory declaration by Mears, to the effect, that to the best of his knowledge and belief, no land-tax had ever been paid for or in respect of the land "subsequently to the purchase *or* redemption thereof in or about the year 1799:"—

Held, that this was not such evidence of the fact of the land-tax having been redeemed, as to entitle the vendor to insist upon a completion of the purchase,—notwithstanding a condition which provided that "every deed and entry on or copy of court roll dated more than *ten years* ago shall be conclusive evidence of everything recited or stated therein:" for, that this was not a direct statement or recital of *the fact* that the land-tax had been redeemed, but only an acknowledgment by the then vendor that the then purchaser had paid a certain sum for the land as being free of land-tax and other encumbrances; and it was consistent with such statement that the land-tax had not been *redeemed*, but that it had been *purchased* or assigned to the then purchaser, or to a trustee for him, in whom or in whose representatives it might still be vested. *Poppleton* v. *Buchanan*, *Buchanan* v. *Poppleton*, 20

3. And held, that the purchaser was entitled to recover back the deposit with interest, and the costs of investigating the title. *Id.*

4. *Quære*, whether this was not properly the subject of compensation, under the ordinary condition for that purpose? *Id.*

Of Goods,—See CONTRACT, 1, 2, 3. STOPPAGE IN TRANSITU.

SET-OFF.

Special Plea of,—See PRINCIPAL AND AGENT, 8.

SHARE DEALER.

See BROKER.

SHIFTING CLAUSE.

See DEVISE.

SHIPPING.

Liability for Necessaries supplied on the order of the Ship's Husband.

1. Necessaries were furnished to a ship on the order of the ship's husband (himself a part-

owner) by whom alone the ship was managed:—Held, that the co-owners were liable, although part of the supplies had been paid for by bills drawn by the ship's husband upon the brokers of the ship, and, on the bankruptcy of the latter, the plaintiff had proved against their estate for the balance. *Whitwell* v. *Perrin*, 412

Wages of Crew.

2. Where a change of ownership in a British vessel takes place, by sale in this country, whilst she is in a foreign port, the contract under which the crew shipped is (quoad the new owner) at an end: but, if one of the crew continues to serve on board the vessel at the request of an agent of the new owner, without entering into any fresh articles, and afterwards, and before the termination of the contemplated voyage, quits with the consent of the captain appointed by the new owner, he may in an action against such new owner recover wages pro rata. *Robins* v. *Power*, 778

SHOW OF HANDS.

See VESTRY.

SMALL PARCELS.

See RAILWAY COMPANY, 9.

SPECIFICATION.

See LETTERS PATENT.

STOPPAGE IN TRANSITU.

Right of, by unpaid Vendor.

A., who resided at Manchester, contracted to buy of B., of Dumfries, a quantity of oak-bark, to be shipped "for delivery at Liverpool." B. accordingly shipped the bark, to be delivered at Liverpool to the defendants, who were wharfingers and carriers there, to be by them forwarded to A. at Manchester. The bark was to be paid for in cash; and B. sent a bill of lading, making it deliverable to "A. or his assigns," together with a bill of exchange payable on demand, through his bankers, to the Manchester and Salford Bank, with instructions to present the bill for acceptance. The bank at Manchester were unable to find A., and accordingly they returned the bill of lading and draft to B. Before the bill of lading had been so returned, B., who was at Liverpool when the bark arrived there, believing from the representations of an agent of the plaintiff (who had bought the bark of A.), that the bill of lading had been duly handed over to A., assented to the bark being delivered to the defendants for the purpose of its being carried to Manchester for the plaintiff; but, upon subsequently discovering that A. had not got the bill of lading or paid for the bark, B. claimed and received it from the defendants:—

Held, that, under the circumstances, the property in the bark never passed to A., and consequently that B. had a right to countermand the delivery; and that it was competent to the defendants, notwithstanding they had received the bark to be carried for the plaintiff, to set up the title of B., in an action brought against them by the plaintiff. *Sheridan* v. *The New Quay Company*, 618

STAYING PROCEEDINGS.

See ARBITRAMENT.

SUNDAY.

See TIME.

SURRENDER.

See COPYHOLD.

TIME.

Computation of.

Appeal from justices.]—Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior courts under the 20 & 21 Vict. c. 43, s. 2, although it be the last day. *Peacock*, app., *The Queen*, resp., 264

TITLE TO LAND.

See COUNTY COURT, 74–7.

TROVER.

See CONVERSION.

TRUSTEES.

Rights and Duties of.

C. leased premises to the defendant, reserving rent to herself, *her executors, administrators, and assigns*, with covenants by the lessee to pay the rent and to yield up the premises at the expiration of the term to C., *her executors, administrators, and assigns*. C. afterwards by lease and release conveyed the reversion to D. and another in trust for the wife of the defendant,—the deed containing, amongst other things, a power to the trustees to receive and retain their trust expenses. The defendant underlet the premises, and received the rent, the trustees never interfering, but, on the contrary, assenting to his so receiving it on behalf of his wife, the cestui que trust. Certain expenses were incurred in relation to the trust. D., the surviving trustee, died, leaving the plaintiff, his

widow and administratrix, who sued the defendant for four years' rent, three of which accrued in the lifetime of D., and one since his death. The defendant pleaded that he before action paid the rent to his wife, with the consent of the trustee and of the plaintiff respectively:—

Held, that the facts above stated afforded no evidence to sustain the plea, and that, whether the interest of C. in the premises were a freehold or a chattel interest, the plaintiff, as administratrix, was at all events entitled to recover the arrears of rent accruing in the lifetime of the trustee. *Dollen* v. *Batt*, 760

VESTRY.

Mode of Voting at.

By the 28th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, the duties of vestries are to be performed by the majority present. By a by-law made pursuant to the 202d section, it was provided that "all questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded:"—Held, that the division or poll might take place after a show of hands. *Tear* v. *Freebody*, 228

VESTRY-CLERK.

Service of Notice of Attachment on.

Service of a notice of attachment out of the Lord Mayor's Court, London, upon the vestry-clerk of a parish without the limits of the city, can have no operation upon a debt due from the vestry to the judgment-debtor. *Newman* v. *Rook*, 434

WAIVER.

Of Right of Re-entry for Breach of Covenant.

A right of re-entry for breach of a covenant in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach, with knowledge of its existence. *Dendy* v. *Nicholl*, 376

WAY.

Obstruction of,—See NUISANCE, 1.

WILL.

See DEVISE.

WITNESS.

Postponing Trial on account of Absence of.

The court will not, at the instance of a defendant, postpone the trial of a cause, on the ground of the absence of a material and necessary witness, where the witness is a captain in the service of the defendant, and the defendant has been guilty of laches in abstaining from securing the testimony of the witness when within his power. *Wright* v. *M'Guffie*, 441

YEAR'S RESIDENCE.

See INSURANCE, 1.

YEARLY HIRING.

See MASTER AND SERVANT.

END OF VOL. IV.

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